Supreme Court of the United States

OCTOBER TERM, 1965

No. 759

ERNESTO A. MIRANDA, PETITIONER,

vs.

ARIZONA

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF ARIZONA

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[fol. A]

IN THE JUSTICE COURT
NORTHEAST PHOENIX PRECINCT,
COUNTY OF MARICOPA, STATE OF ARIZONA

No. 7435

STATE OF ARIZONA

vs.

ERNEST ARTHUR MIRANDA, DEFENDANT

CRIMINAL COMPLAINT—Filed March 14, 1963

Before me, CHARLES F. COPPOCK, a Justice of the Peace of NORTHEAST PHOENIX Precinct, in and for Maricopa County, State of Arizona, on this 14th day of March, A.D. 1963 personally appeared GLENN MARTIN who on oath deposes and says it is his information and belief that at NORTHEAST PHOENIX Precinct, Mari-

COUNT I:

copa County, State of Arizona, on or about the 3rd day of March, 1963, ERNEST ARTHUR MIRANDA did then and there commit a felony, to-wit: KIDNAPPING as follows, to-wit:

The said ERNEST ARTHUR MIRANDA on or about the 3rd day of March, 1963, and before the filing of this complaint at NORTHEAST PHOENIX Precinct, in the County of Maricopa, State of Arizona, did then and there wilfully, unlawfully and feloniously, seize, confine, abduct, conceal, kidnap or carry away one Patricia Ann Weir for the purpose of raping and did rape said Patricia Ann Weir, said Patricia Ann Weir not being related in any way to said defendant, ERNEST ARTHUR MIRANDA, all contrary to the provisions of sec. 13-492, (A). (C. 2.), A.R.S.

COUNT II: For a further and separate cause of action, being a different offense from, but connected in its commission with the charge set forth in Count I hereof,

[fol. D]

IN THE SUPERIOR COURT OF MARICOPA COUNTY, STATE OF ARIZONA

DIVISION NO. 3

MINUTE ENTRY ORDERING MENTAL EXAMINATION—May 20, 1963

* * * *

This matter has been under advisement: IT IS ORDERED appointing Dr. Leo Rubinow and Dr. James M. Kilgore, Jr. to make their examinations and render their reports under Criminal Rule 250.

* * * *

[fol. E]

PSYCHIATRIC REPORT OF DR. JAMES M. KILGORE, JR., M.D. —May 28, 1963

JAMES M. KILGORE, JR., M.D.
Suite 209
461 West Catalina Drive
Phoenix 13, Arizona

PSYCHIATRY

May 28, 1963

Honorable Warren L. McCarthy
Judge of the Superior Court
Maricopa County
Court House
Phoenix, Arizona

MIRANDE, Ernest Arthur
Criminal Cause #41947, #41948

Ernest Arthur Mirande is a 23-year-old Mexican male who was examined by me in the County Jail on May 26, 1963.

Mr. Mirande is charged with the offense of robbery in relation to one Barbara Sue McDaniel on November 27, 1962. Mr. Mirande states that on that evening approxi-

mately 9:30 p.m. he saw a lady go to her car in the parking lot alone. He approached the car and got in the front seat. He stated at the time that he didn't know whether he would rob or rape the lady. She asked him if he didn't want to go to her apartment. Mr. Mirande stated that this frightened him in that she was so eager for sex and decided at that point to ask for money which she readily gave to him. He then said, "Don't worry. If I had wanted to rape you, I would have done it before."

The second offense for which Mr. Mirande is charged occurred on March 3, 1963, at which time he is supposed to have kidnapped and raped Patricia Ann Weir. Mr. Mirande stated that he knew Patricia Ann Weir, an 18-year-old single girl who worked in the theater. He had occasionally seen her there and on the evening of March 3 at approximately 11:00 p.m. he saw her walking toward the bus stop. He drove ahead of the bus and when she got off close to her home he was waiting for her. As she came close to the car he said to her, "You don't have to scream. I am not going to hurt you." He then told her to get into the car, which she did, and they drove out into the desert. He asked her to remove her clothing, which she did without resistance. He removed his clothes and performed the act of sexual intercourse. Miss Weir, according to the patient, did not resist, but during [fol. F] the process of sexual relations was tearful. Mr. Mirande was somewhat upset when he learned that the girl had not previously had sexual relations. He stated that if at any time the girl had refused or resisted, that he would not have proceeded. He then took her within a block or two of her house where he let her out. He asked if she would "tell on me." The girl did not respond. He stated "I didn't know how to ask her for forgiveness."

Mr. Mirande is age 23 and he has a common-law wife, age 30. They have been living together since August, 1961. His wife has two children by her first husband, a son, 11, and a daughter, 10. Mr. Mirande and his wife have a daughter, 9½ months of age. He has worked as a truck driver and also as a worker in a warehouse.

Mr. Mirande's father is age 55 and works as a painter in Mesa. He stated that he did not get along with his father during his adolescent years and was frequently beaten up by his father when he got into trouble. Mr. Mirande's mother died in 1946 at the age of 34 when Mr. Mirande was six years of age. He was reared by his step-mother, age unknown. He stated with reference to her, "I never could get adjusted to her." Mr. Mirande completed half of the ninth grade at the age of 15. Mr. Mirande was first placed on probation at the age of 14 after having stolen a car. Three months later he was sent to Fort Grant for a period of six months. Shortly after returning he was sentenced for a year on an attempted rape and assault charge. According to Mr. Mirande's description of this incident, he was walking by a home in which he saw a lady lying in bed with no clothes on. He went up to the front door and it was open; he entered the home and crawled in bed with the woman. Her husband returned home shortly and the police were called. In 1957 at the age of 17 Mr. Mirande was picked up in Los Angeles for being a peeping tom and charged with lack of supervision and was placed on probation. He was also arrested twice in L.A. on suspicion of armed robbery. He was in the Army from April, 1958, to July, 1959. He was placed in the brig for being a peeping tom and given an undesirable discharge. In December, 1959, he was sentenced to the Federal Penitentiary for transporting a stolen automobile across state lines.

Mr. Mirande is a 23-year-old Mexican man who is alert and oriented as to time, place, and person. His general knowledge and information is estimated to be within normal limits as is his intelligence. He is emotionally [fol. G] bland, showing little if any effect. He is shy, somewhat withdrawn. He tends to be somewhat hypoactive. The patient's responses to proverbs are autistic and somewhat bizarre; for example, to the proverb "a rolling stone gathers no moss", the patient interpreted this to mean "If you don't have sex with a woman, she can't get pregnant." To the proverb "a stitch in time saves nine",

Mr. Mirande's response is "If you try to shut something in, you keep it from going out." To the proverb "people in glass houses shouldn't throw stones", Mr. Mirande states "A person with one woman shouldn't go to another women." Mr. Mirande states that he is not particularly concerned about himself at this point or the trouble that he is in except in that it might interfere with his looking after his wife and child.

It is my diagnostic impression that Mr. Mirande has an emotional illness. I would classify him as a schizophrenic reaction, chronic, undifferentiated type.

It is my opinion that Mr. Mirande is aware of the charges that have been brought against him and is able to cooperate with his attorney in his own defense. Although Mr. Mirande has an emotional illness, I feel that at the time the acts were committed that he was aware of the nature and quality of the acts and that he was further aware that what he did was wrong.

/s/ James M. Kilgore, Jr.
JAMES M. KILGORE, JR., M.D.

JMK/db

[fol. H]

IN THE SUPERIOR COURT OF THE
STATE OF ARIZONA IN AND FOR
THE COUNTY OF MARICOPA

No. 41948

STATE OF ARIZONA, PLAINTIFF

vs.

ERNEST ARTHUR MIRANDA, DEFENDANT

REPORTER'S TRANSCRIPT OF PROCEEDINGS
June 20, 1963

BEFORE: The Honorable Yale McFate, Judge of the Superior Court, presiding in Division No. 10, with a jury.

APPEARANCES: Mr. Lawrence Turoff, Deputy County Attorney, in behalf of the State of Arizona; Mr. Alvin Moore, in behalf of the defendant.

[fol. 1] * * *

[fol. 2] THE COURT: The State versus Ernest Arthur Miranda. Is the State ready?

MR. TUROFF: State is ready.

MR. MOORE: Defense is ready, except for the record, we would like to renew our motion made before the trial for violation of substantial rights in delaying of the trial more than sixty days, as set forth in our former motion.

THE COURT: Very well, motion will be denied. The Clerk will call thirty-two jurors. Ladies and Gentlemen, as your names are called, please come forward and take seats in the jury box.

(Thereupon a jury was duly empaneled and sworn to try the cause at issue.)

THE COURT: The Clerk will now read the information in this case and state the dependant's plea.

(Thereupon the Clerk read the information.)

THE CLERK: To which the defendant entered a plea of not guilty.

THE COURT: Mr. Turoff, go ahead.

MR. TUROFF: The state waives opening.

MR. MOORE: We reserve our opening.

THE COURT: Very well, call your first witness.

MR. TUROFF: At this time, we would like to invoke the Rule.

[fol. 3] THE COURT: All right, all witnesses come forward.

(Thereupon the Clerk swore the following witnesses: Wilfred Young, Patricia Weir and Sue Williamson.)

THE COURT: Now, Ladies and Gentlemen, the Court is placing the witnesses under the Rule of Exclusion, and that means you will have to remain outside the hearing of these proceedings, and you will not be permitted to discuss either among yourselves or with any other person, what your testimony is going to be, and after you

have testified, do not reveal to anyone what you have testified about, until the case is finally submitted to the jury for decision. Do you understand that?

(Thereupon the witnesses answered in the affirmative.)

THE COURT: There is one exception and that is you may talk to the lawyers in the case at any time about the case, but otherwise, keep your testimony entirely to yourselves, and remain outside the hearing of these proceedings. The bailiff will show you chairs in the outer office.

MR. TUROFF: Call Patricia Weir.

[fol. 4] PATRICIA WEIR,

was called as a witness on behalf of the State, and having been previously sworn, testified as follows:

DIRECT EXAMINATION

BY MR. TUROFF:

Q Will you state your name?
A It is Patricia Weir.
MR. TUROFF: Speak up a little louder please.
A Patricia Weir.
Q Where do you live?
A 1014 East Citrus Way.
O Is that in the City of Phoenix?
A Yes.
Q How old are you Patricia?
A Eighteen.
Q Are you married?
A No.
Q Patricia, were you married on March 3rd of this year?
A No.
Q Are you presently employed?
A No.
Q On March 2 and March 3 of this year, were you employed?
A Yes.

[fol. 5] Q Where were you working?
A The Paramount Theatre.
Q Is that here in Phoenix?
A Yes.
Q Maricopa County?
A Yes.
Q What did you do there?
A I worked at the concession stand.
Q Were you working on the night of March 2?
A Yes.
Q What time did you quit work, Patricia?
A It was about 10:30.
Q In the evening?
A Yes.
Q After you quit work, what did you do?
A Pardon?
Q After you quit work, what did you do?
A I went directly in the lounge and got dressed, and I waited down there until my bus came.
Q What time were you to catch the bus?
A 11:45.
Q Where were you going to catch this bus?
A On 1st Street and Monroe.
Q Did you catch it?
A Yes.
Q About what time was that? Was that 11:45?
[fol. 6] A Yes.
Q Where were you going on the bus, Patricia?
A Home.
Q To 1014 East Citrus Way?
A Yes.
Q With whom did you live at that address?
A My sister and her husband and my mother.
Q What is her name, your sister's name?
A It is Susan Williamson.
Q You say you did catch the bus, and where did you get off of the bus?
A 7th Street and Marlette.
Q 7th Street and Marlette?
A Yes.
Q Is that in Maricopa County?

A Yes.

Q Do you recall about what time you got off the bus?

A It was about ten after twelve.

Q Were you alone or were you with somebody at that time?

A I was alone.

Q Patricia, when you got off the bus, you got off at Marlette, you said, and 7th Street?

A Yes.

Q What did you do then?

[fol. 7] A I started, I was walking east.

Q On what street?

A On Marlette.

Q Were you walking towards your home?

A Yes.

Q Would you tell us, was it dark out?

A Yes.

Q Were there any people on the streets at that time?

A No.

Q What happened next, Patricia, after you started walking home, what next did you observe?

A Well, there is this—there was a parking lot behind this ballet school on Marlette, and I noticed that this car pulled out.

Q A car pulled out of the parking lot?

A Yes.

Q Did it come close to you at that time?

A Yes, I had to jump back from the car to keep from being hit.

Q Did you observe that car again, or did you observe that car and where it went?

A It went east on Marlette and it parked down across from these apartments.

Q About how far away was that? You may not be able to give us in feet, but was it in the next block or [fol. 8] was it in the same block you were in, or what?

A Yes, it was in the same block.

Q It was parked east of where you were, is that correct?

A Yes.

Q What happened next, Patricia?

A Well, I started walking and I noticed that this man was coming towards me.

Q At that time, did you see where he came from?

A Yes, from the parked car. I didn't see him get out of the car.

Q All right, you saw a man walking towards you. What happened?

A I didn't pay any attention because I always pass people walking on that street, and I just kept on walking, and finally, well, I just—it happened so, suddenly, I didn't have time to do anything.

Q What happened?

A Well, he told me not to scream, that he wouldn't hurt me.

Q Did he touch you in any way?

A Yes, he had my hands behind my back and one hand over my mouth and he started pulling me towards [fol. 9] the car.

Q Patricia, this man you have just referred to, is he in the courtroom today?

A Yes.

Q Would you point him out?

A Sitting over there (indicating).

Q There are three men sitting at this table Patricia. The one next to the bookcase, the gentleman in the white shirt, or the officer?

A On the left.

Q On the left, that is the man in the white shirt?

A In the suit.

Q In the suit next to the bookcase?

A Yes.

MR. TUROFF: Let the record show the witness has identified the defendant, Mr. Miranda.

Q At that time, Patricia, were you married to Mr. Miranda?

A No.

Q Have you ever been married to him?

A No.

Q Are you related to him in any manner?

A No.

A It was around me.

Q His hands were around you?

A Yes.

Q Do you know what we refer to when we say the male sex organ?

A Yes.

Q You say he made penetration. Would you tell us now what he made penetration with if you can, would you tell us what he made penetration with, Patricia?

A With his penis.

[fol. 17] Q With his penis; now, are you familiar with what we term the female sex organ?

A Yes.

Q Did he make penetration into your female organs?

A Yes.

Q Did you at any time, Patricia, permit him to do this voluntarily?

MR. MOORE: We object to the form of the question, leading and suggestive.

THE COURT: Overruled.

MR. TUROFF: You may answer. Did you permit him to do this voluntarily?

A Well, he was a lot stronger than I was.

Q Now, during the period of time that he made penetration, Patricia—strike that—what were you doing during this period of time that you have just testified to?

A I was pushing against him with my hands. I kept screaming. I was trying to get away but he was a lot stronger than I was, and I couldn't do anything.

Q Now, after he made penetration, I assume he then removed himself, is that correct?

A Yes.

Q What happened next?

[fol. 18] A He got dressed and—

Q Go ahead.

A And he got out of the car and he came back and sat in the front seat and he told me to get dressed.

Q What happened then?

A Well, at first, all I could do was just lay there and cry. It took me about five minutes to get up and get dressed.

Q Let's go back a little ways, Patricia: Prior to his removing himself, did he complete an act of sexual intercourse?

A Yes.

Q Now, you say he told you to get dressed and you did after awhile, after you attempted to calm down?

A Yes.

Q What happened next, Patricia?

A He got out of the car and he went into the front seat.

THE COURT: Excuse me, Ma'am, is there anyone on the jury who cannot hear the witness?

(No response from the jurors.)

THE COURT: Go ahead.

MR. TUROFF: Q He went into the front seat and what happened?

[fol. 19] A Then I got dressed.

Q After you got dressed, what happened next?

A Then I asked him, I said, "May I please have my watch back?"

Q Where was your watch at that time?

A It was on the back seat.

Q Do you know how it got there?

A He put it there.

Q He put it there; what happened next after you asked for your watch back?

A And he said, "I will if you say please to me."

Q Did you get your watch back?

A Yes.

Q What did he do next?

A Then he started the car and then—

Q He took you from—

A He took me to 12th Street and Rose Lane and dropped me there.

Q How far is that from your home, Patricia?

A It was about three—about four blocks.

Q Had you told him where to go, where to drop you off?

A He did, ask me, and I told him it was on Rose Lane, so he just dropped me off at 12th Street.

Q And you got out of the car, did you?

[fol. 20] A Yes.

Q What did you do next?

A I started walking home.

Q Walking home?

A And when I got about a block, I started running.

Q You started running home?

A Yes.

Q At that time, what was your physical condition?

A Well, after it happened, it was pretty hard to think. I couldn't think.

Q Were you calm or excited?

A I was excited.

Q Crying or not?

A I wasn't crying.

Q You got to your house, and you say you lived there with your sister and brother-in-law and your mother?

A Yes.

Q Did you enter your home?

A Yes.

Q Were they home at that time?

A Yes.

Q At that time, Patricia, did you tell them what had happened, what you told us now?

[fol. 21] A Not at first; it was about fifteen minutes before I could get things straight.

Q When you entered your house, what was your condition at that time?

A My hair was all over the place and I was—all my makeup was off.

Q Were you upset at that time?

A Yes.

Q Were you crying?

A Yes.

Q Then you say it was fifteen minutes before you told them what had happened; did they ask you what had happened?

A Yes, they kept trying to get it out of me and then my sister said, "If you don't shutup, I will have to call the police," and I still didn't quiet down yet, and then finally I did, and then she called the police and so I got ready and the police came out and questioned me.

Q Now, after the police came out, did you go to a hospital?

A Yes, thhe police took me to the hospital.

Q Patricia, would you tell us approximately what time, period of time this took place in? You say that you got off at 7th Street and Marlette about ten after twelve. Do you know what time you finally returned [fol. 22] home?

A I was about two.

Q About two?

A After two.

Q That was on March 3, 1963, is that right?

A Yes.

Q Patricia, at the outset, did you consent to entering Mr. Miranda's car?

A No.

MR. TUROFF: I have no further questions of this witness.

THE COURT: Before cross examination, it is time for the recess, so we will have a recess Ladies and Gentlemen, for fifteen minutes; and now during this recess and during each recess which we may have in this case, please bear in mind these admonitions: You are admonished that it is your duty not to converse among yourselves or with anyone else on any subject connected with this trial, or to form or express any opinion at all until the action is finally submitted to you for decision.

You are also admonished that you are not to view the place where the offense appears to have been committed.

I would like to further admonish you not to read or listen, not to read newspaper accounts, if any, of this [fol. 23] particular case, and not to listen to any broadcasts, television broadcasts or radio broadcasts about the case, if you can possibly avoid doing so. We'll see you in fifteen minutes.

(Thereupon a recess was taken after which proceedings resumed as follows:)

PATRICIA WEIR,

resumed the witness stand for further examination as follows:

CROSS EXAMINATION

BY MR. MOORE:

Q Miss Weir, I am going to try not to embarrass you on this cross examination, but the liberty of a man's life is at stake, and I must ask you a number of questions and please don't break down. Just give me quiet truthful answers and we will get along just fine.

First, I want to establish some time elements. At what time did the defendant accost you or stop you on the street?

A It was fifteen after twelve.

Q I believe you testified he drove about twenty or twenty-five minutes?

A Yes.

[fol. 24] Q Before he parked somewhere?

A Yes, that is right.

Q Do you know where that somewhere was?

A I was in the desert area.

Q But you don't know whether it was north, south, east or west?

A It was east.

Q And you don't know how far?

A No, I don't.

Q Now, at what time did he let you out near your home.

A It was after two.

Q Do you know how much after two? About how many minutes? Did you have your watch? I believe you testified he had given your watch back to you.

A I was about fifteen after two.

Q Two-fifteen then you returned home. Now, how long after arriving home before you explained to your sister what had happened?

A About twenty minutes.

Q Then you explained to your sister about two thirty-five. Now, how long after you talked to your sister of the occurrence was it before the police arrived?

A It was about fifteen minutes.

Q That would make their arrival at about 3:00?

[fol. 25] A Yes.

Q Now then, at the time the defendant accosted you on the street, what did he say to you, and what did you say to him?

A He said, "Don't scream, I am not going to hurt you." He said, "If you don't scream, I won't hurt you."

Q What did you say to him?

A I said—

Q You said what?

A "Let me go, please let me go."

Q Now, at the point he accosted you on the street, will you tell us again where that was?

A 7th and Marlette.

Q 7th and Marlette?

A Yes.

Q Is that a residential area or a business area?

A Residential area.

Q Houses on both sides of the street? Are there residences on both sides of the street at that point?

A Yes.

Q What day of the year was this?

A March 3rd.

Q Was it a cool or balmy evening?

[fol. 26] A It wasn't very cool.

Q How were you dressed, Patricia?

A I had a suit on.

Q What type of suit?

A Made just like this, a vest.

Q Was it a two piece suit?

A Three piece.

Q And the vest or whatever you call it, was it a pull-over or does it button?

A It was a pull-over.

Q What other clothing did you wear?

A A bra, slip, pants.

Q Full slip or half slip?
A Full slip.
Q Were you wearing shoes and stockings?
A No, just flats.
Q Just flats?
A Yes.
Q How old were you on March 3rd?
A Eighteen.
Q When were you eighteen, Patricia?
A I was eighteen November 24th.
Q Now, how did he place you in the car? How did he get you in there?
A He laid me down in the back seat.
Q But getting you into the car, how did you get in? [fol. 27] Did he hold the door open and say, "Get in," and you went in of your own accord?
A He pushed me in.
Q Wnen you say "pushed", you mean he shoved you?
A No.
Q Did he have ahold of your arm as you went in the door or not?
A Yes.
Q When did he turn loose of your arm?
A When he started to tie them.
Q When he started to what, tie?
A To tie my arms.
Q What kind of string, rope or what did he use to tie your arms?
A It was a thick rope.
Q Did he have two ropes or one?
A He had a rope for my hands and a rope for my angles.
Q Two ropes?
A Two.
Q Where did he get the ropes?
A In the front seat. He had the rope in his hand.
Q Did he have the ropes in his hands at the time he grabbed you by the arm?
[fol. 28] A Yes.
Q When did you first see the rope?
A When he started to tie me.

Q When he accosted you on the street, he didn't have the ropes in his hand, did he?

A No.

Q He got the ropes somewhere from the car then?

A Yes.

Q Could you tell whether they were in the front seat or back seat?

A I am not sure where they were.

Q Did you scream?

A No, I couldn't. It all happened so sudden, I couldn't scream. It all happened so fast

Q But just your panicky situation is all that kept you from screaming, wasn't it?

A Yes.

Q He didn't have his hand over your mouth all that time?

A Yes, he did.

Q All that time?

A When he was putting me in the car.

Q He did when he accosted you?

A Yes.

Q When did he take his hand off your mouth?

A When he put me in the car.

[fol. 29] Q Then he tied you up; how long did it take him to tie you up?

A About ten minutes.

Q About ten minuttes; and during the time he was tying you up, he was using both hands, was he not, tying you up?

A Yes.

Q During that interval, did you scream?

A No.

Q There were houses in the area, weren't there?

A Yes.

Q Why didn't you?

A Because he threatened me. I mean, he said, "Don't scream, I won't hurt you."

Q He said that out in the street?

A Yes.

Q After he tied you up in the back seat, what did he do?

A He put something sharp against my neck.
Q After he tied you up?
A Yes.
Q Not before?
A No.
Q Were there street lights there?
A No.
[fol. 30] Q Was it dark, medium, or how light was it?
A It was dark.
Q So you don't know what that something sharp was he put against your neck?
A No, I do not.
Q All right, now then, he drove away with you?
A Yes.
Q Were you lying down in the back seat?
A Yes, my face to the back.
Q With your face—
A To the back seat.
Q I believe in your direct testimony, you testified that he turned south at 10th Street?
A Yes.
Q How could you tell?
A Well, because the next street is 9th and it was too close for him to turn, then he went farther than 9th Street.
Q So you assumed--you didn't see the signs?
A No, I didn't.
Q You couldn't see the signs so you just assumed he turned south on 10th Street?
A Yes.
Q You don't know it, do you?
A Yes, I do know it.
[fol. 31] Q How?
A Because 9th Street was too close for him to turn there, and he went farther than that.
Q Could you tell how far he went lying there facing that back seat?
A Yes, I could.
Q All right, he turned south on 10th Street. Where did he go from there?
A Then he turned east on Rose Lane.

Q Were you still lying down in the same position?
A Yes.
Q How could you tell that it was Rose Lane he turned on?
A Because the next street was Rose Lane, and he turned east.
Q You could tell?
A Yes.
Q You could tell the direction lying in the back seat?
A Yes.
Q How far did he go on Rose Lane?
A I don't know how far he went from there?
Q Do you know where he turned off from there?
A No.
Q How long did you drive before you stopped
[fol. 32] A About twenty minutes.
Q At any time, did he stop for an intersection while traveling?
A Yes.
Q How many times did he stop the car between the time he first accosted you and he finally stopped on the desert?
A I am not sure.
Q Let's make an estimate, about how many times? Do you have any idea about the number? Was it five?
A It was about three or four times, I guess.
Q And all this time you were tied up lying in the back seat?
A Yes.
Q And it took you how many minutes—I believe you testified twenty minutes from the time you were accosted until you stopped on the desert?
A Yes.
Q When he stopped, you were still in the back seat?
A Yes.
Q And was still tied up?
A Yes.
Q What did he do then after he stopped?
A He got out of the car and it was about ten min-
[fol. 33] utes before he came to the back seat.
Q About how long?

(Thereupon the witness was excused.)

MR. TUROFF: Mrs. Williamson.

[fol. 40] SUE WILLIAMSON,

was called as a witness on behalf of the State, and having been previously sworn, testified as follows:

DIRECT EXAMINATION

BY MR. TUROFF:

Q State you name please.
A Sue Williamson.
Q Where do you live?
A 1014 East Citrus Way.
Q Mrs. Williamson, are you related to Patricia Weir?
A Yes.
Q What is your relationship to her?
A Sister.
Q Calling your attention to the early morning of March 3, 1963, was Patricia, during that period of time, was she living with you at that address?
A Yes, she was.
Q Calling your attention again to the early morning of that date, did you have occasion to see your sister?
A Yes, I did.
Q Was that at your home?
A Yes, it was.
[fol. 41] Q Had you been home that night and morning?
A Yes.
Q Had she been home all during that period of time?
A No.
Q Would you tell us what time she did come home that morning?
A She came home at twenty-five until two.
Q Did you see her when she came home?
A Yes, I did. I was going out to look for her because she was late coming home.
Q Would you describe to us, Mrs. Williamson, the physical condition of your sister as you saw her when she came home?

A She came home, pounded on the door, her hair was all over like she had been in a fight, and her dress was brand new, a new suit, and it was a mess, and she was crying and carrying on, and I asked her what was the matter, and she would not tell me.

Q How long a period of time did she cry and carry on before she could tell you what happened?

A A good fifteen minutes.

Q Did she then tell you what happened?

A I kept at her, if she didn't tell me what happened, I was going to call the police.

[fol. 42] Q Did she tell you what happened?

A Yes, she did.

Q What did she tell you happened?

A She told me a man had picked her up when she got off the bus and took her out on the desert and I said, "Patricia, he didn't touch you, did he?"

She said, "Yes."

I said, "All right," and I went right and called the police.

Q You called the police?

A I called the police.

Q They came right out?

A They came right out.

Q How long has your sister lived with you, Mrs. Williamson?

A She had lived with us about two years at the time, and before that, I had lived right in the front house and they had lived in the house in the back of us.

Q Who is "they"?

A My mother and Pat and my step-father, which is dead.

Q Did your mother live with you at 1014 West Citrus Way?

A Yes, she did.

Q To your knowledge, did Pat usually go out with [fol. 43] boys?

A Pat has never—

MR. MOORE: I object to that as being irrelevant and immaterial, not an issue in the case.

MR. TUROFF: I think defense Counsel has already attempted to bring up the matter of her conduct.
THE COURT. Sustained.
MR. TUROFF: I have no further questions.
MR. MOORE: I have no questions.
MR. TUROFF: May this witness be excused?
THE COURT: You may be excused.
MR. TUROFF: May Miss Weir be excused?
THE COURT: Yes, you may both be excused.

(Thereupon the witness was excused.)

MR. TUROFF: Call Officer Cooley.

CARROLL COOLEY,

was called as a witness on behalf of the State, and being first duly sworn, testified as follows:

DIRECT EXAMINATION

BY MR. TUROFF:

Q Would you state your name, please?
A Carroll Cooley.
Q What is your occupation?
[fol. 44] A Police officer.
Q Are you connected with any particular detail?
A Work for the City of Phoenix Detective Bureau, in the Crimes Against Persons' Detail.
Q How long have you been so employed?
A Little over five years.
Q Were you so employed on the day of March 3rd, 1963?
A Yes, Sir.
Q In connection with you employment, Officer, did you have occasion to see the defendant, Ernest Miranda?
A Yes, Sir, I did.
Q Is he in the courtroom today?
A Yes, Sir.
Q Will you point him out, please?
A He's the gentleman sitting over here with the brown suit on.

MR. TUROFF: Let the record show the witness has identified the defendant.

THE COURT: Very well.

MR. TUROFF: Q Where did you first see the defendant, Officer?

A At his home at 2525 West Maricopa.

Q What was your purpose in going there?

[fol. 45] A We had gone there to investigate a rape.

Q Did you have an occasion at that time to take the defendant down to the police department?

A Yes, Sir, I did.

Q Who was with you when you went out there?

A Detective Bill Young.

Q When you got down to the police station, Officer, was the defendant in your custody?

A Yes, Sir, he was.

Q Did you cause anything to be done with the defendant at that time?

A Yes, Sir, we placed him in a line-up.

Q What did that consist of, Officer?

A Four other Mexican males all approximately the same age and height, build.

Q Did you have any persons view that line-up, Officer?

A Yes, Sir, we called in the victim, Patricia Weir.

Q Did she view the line-up?

A Yes, Sir, she did.

Q Officer, after Miss Weir viewed the line-up, did you have occasion to have a discussion with the defendant?

A Yes, Sir, I did.

Q Where did this discussion take place?

[fol. 46] A In Interrogation Room No. 2 of the detective bureau.

Q Who was present during this discussion, Officer?

A Myself, Detective Young and the defendant.

Q Do you know approximately what time of day this took place?

A Approximately 11:30.

Q Was that on March 13th?

A Yes, Sir.

Q 11:30, is that a.m. or p.m.?

A A.M.

Q Now, during the period, let's say the period of time you had first arrested or picked up the defendant, brought him to the police department and then had the interrogation with him, was he in your custody all during that period of time?

A Yes, Sir, he was.

Q During that period of time, did you make any threats or use any force on the defendant?

A No, Sir.

Q During this period of time, did you make the defendant any promises of immunity if he would have this discussion with you?

A No, Sir, I did not.

Q Did any other officers in your presence, do any [fol. 47] of these acts?

A No, Sir.

Q Officer, would you relate to us the best of your ability now, what the conversation you had with the defendant was, what you said to him, and what his answers were to you?

A Yes, Sir, the conversation was in regards to the rape of Patricia Weir, and when we first started talking to the defendant he at first denied this. After talking to him for awhile—

MR. MOORE: We object, Your Honor, to the narrative. We would like for him to use questions and answers to get this evidence.

THE COURT: I think he is relating the substance of the conversation. Just confine yourself to the substance as nearly as you can recall of the conversation.

THE WITNESS: Yes, Sir.

MR. TUROFF: Go on.

A He said, after a short time, he said that he was the person that had raped this girl that we were questioning him about. However, he did not know her name. He said that, he related that he had been up in the northeast area of Phoenix driving around, when he saw a girl walking on a street.

[fol. 48] MR. MOORE: We again request questions and answers instead of a story.

THE COURT: Overruled.

MR. TURNOFF: Continue, Officer.

A He did tell it at length, of his own free will, and he said that he had—

MR. MOORE: We ask that be stricken.

THE COURT: It is not responsive. You were relating the conversation, so just go ahead.

MR. TUROFF: Just relate the conversation as you were, Officer.

A He saw this girl walking on the street, he said, so he decided he would pull up ahead of her and stop. He stopped and got out of his car and opened the back door of his automobile. He said when the girl approached him he told her, he said, "Don't make any noise, and get into the car," and he said she got into the car, he said, in the back seat.

After getting into the car, he said he took a small rope he had inside the car and he tied her hands and her ankles, then he got into the front seat behind the driver's wheel and he drove to a location several miles from there in the northeast direction to the area of a desert.

Q Did he tell you what street this took place on?

[fol. 49] A He didn't know the street. I asked him the street, and he didn't know the name of the street, he didn't know exactly where he was located when he stopped. It was just in the desert area, couple of miles from where picked the girl up.

He said then when he got there he noticed that the girl was untied, and he got into the back seat and he asked her if she would, or he told her to take her clothes off and she said, "No, would you please take me home?"

He said then he took her clothes off for her. After he had undressed her, she began to cry, and started begging him to not do this. She said she had never had any relations with a man before.

He said he went ahead and performed the act of intercourse, and in so doing was only able to get about a half inch of his penis in and at which time he said he did reach a climax, but he didn't believe that he had reached a climax inside of her.

He said after the act of intercourse, he then told her to get dressed and asked her where she lived and she told

him in the area, she told him 10th or 12th Street. He couldn't remember where, so he said he drove her back to the area where he picked her up and dropped her off [fol. 50] in that general area.

When he started to let her out, why she told him, "Well, this is not where I live."

He said, "This is as far as I am taking you," and then he asked her if she would pray for him. She got out of the car and he left and he said then he went home.

Q Was that the essence of the conversation you had with him at that time?

A That was the essence of the conversation.

Q Officer, was this conversation reduced, or was the defendant's conversation with you reduced to writing?

A Yes, Sir, it was.

Q Who wrote it down, Officer?

A He wrote his own statement down.

Q He wrote it down?

A Yes, Sir.

Q Were you present, Officer, when he wrote this?

A Yes, Sir, I was.

Q Officer, I will show you what has been marked State's Exhibit No. 1 for identification and ask you to look at that and tell us whether or not you can identify that.

A Yes, Sir, I can identify it.

[fol. 51] Q How can you identify it, Officer?

A My signature is on the bottom, and I recognize the heading, the writing.

Q Could you tell us when you placed your signature on that?

A After the statement was complete.

Q The same day?

A The same time, yes. It was 1:30 p.m. on 3-13-63, Interrogation Room No. 2 of the Detective Bureau.

Q Is this the statement that you said the defendant reduced to writing?

A Yes, Sir, it is.

MR. TUROFF: At this time, State will move to introduce the exhibit in evidence.

MR. MOORE: May I ask some questions on voir dire?

THE COURT: Yes, you may.

VOIR DIRE EXAMINATION

MR. MOORE: Q Officer Cooley, in the taking of this statement, what did you say to the defendant to get him to make this statement?

A I asked the defendant if he would tell us, write the same story that he had just told me, and he said that he would.

Q Did you warn him of his rights?

A Yes, Sir, at the heading of the statement is a para-
[fol. 52] graph typed out, and I read this paragraph to him outloud.

Q Did you read that to him outloud?

A Yes, Sir.

Q But did you ever, before or during your conversation or before taking this statement, did you ever advise the defendant he was entitled to the services of an attorney?

A When I read —

Q Before he made any statement?

A When I read the statement right there.

Q I don't see in the statement that it says where he is entitled to the advise of an attorney before he made it.

A No, Sir.

Q It is not in that statement?

A It doesn't say anything about an attorney. Would you like for me to read it?

Q No, it will be an exhibit if it is admitted and the jury can read it, but you didn't tell him he could have an attorney?

MR. TUROFF: This is not proper voir dire. He may go into this on cross examination, but this is not proper voir dire.

THE COURT: Sustained.

MR. MOORE: We object because the Supreme Court
[fol. 53] of the United States says a man is entitled to an attorney at the time of his arrest.

MR. TUROFF: State offers in evidence State's Exhibit 1 for identification.

THE COURT: Objection is overruled, may be admitted, Exhibit 1 in evidence.

MR. TUROFF: I have no further questions.

CROSS EXAMINATION

BY MR. MOORE:

Q It is not your practice to advise people you arrest that they are entitled to the services of an attorney before they make a statement?

A No, Sir.

MR. MOORE: That is all.

THE COURT: All right, you may step down, Sir.

(Thereupon the witness was excused.)

THE COURT: Before you call another witness, we will take a recess. We will be in recess, Ladies and Gentlemen, until 1:30 this afternoon.

[fol. 54] June 20, 1963
1:30 o'clock P. M.
Afternoon Session

(All parties being present as heretofore noted, proceedings resumed as follows:)

THE COURT: Let's proceed with the case.

MR. TUROFF: Call Officer Young.

WILFRED YOUNG,

was called as a witness on behalf of the State, and having been previously sworn, testified as follows:

DIRECT EXAMINATION

BY MR. TUROFF:

Q Would you state your name, please?

A Wilfred Young.

Q What is your occupation?

A Police officer, City of Phoenix.

A Are you connected with any particular detail of the police department?

A Crime Against Persons' Detail, Detective Bureau.

Q How long have you been so employed, Officer?

[fol. 55] A Ten years.

Q Were you working on March 3, 1963?

A Yes, Sir.

Q On that date, Officer, did you have occasion to see the defendant?

A Yes, Sir.

Q Is he in the courtroom today?

A Yes, Sir, he is.

Q Point him out, will you please?

A The gentleman sitting at the table with black hair and glasses.

Q On that date, where did you first see him?

A I beg your pardon?

Q On that date, Officer, on the 3rd of March, where did you first see the defendant?

A 2525 West Maricopa.

Q Where you in the company of another officer?

A Detective Carroll Cooley.

Q On that date, did you have occasion to take Mr. Miranda down to the police department?

A Yes, Sir.

Q Okay, and did you, on that date, have an occasion to have a conversation, either you or Officer Cooley, in your presence, with the defendant?

A Yes, Sir.

Q Would you tell us approximately what time that [fol. 56] conversation took place?

A Between 11:30 and 12.

Q Where did it take place, Officer?

A Interrogation Room No. 2 in the Detective Bureau.

Q Who was present during this conversation?

A Detective Cooley, myself and Mr. Miranda.

Q Prior to this conversation, Officer, did you make any threats to Mr. Miranda?

A No, Sir.

Q Did you use any force on Mr. Miranda to have him hold this conversation with you?

A No, Sir.

Q Did you make him any promises of immunity?

A No, Sir.

Q In your presence, did Officer Cooley do any of these things?

A No, Sir.

order to do that, we have put on the evidence, and I want to go over it very briefly as to what the evidence indicated.

The evidence indicated that Miss Weir was working at the Paramount Theatre on the night of March 2, 1963. She left the theatre somewhere around a quarter to twelve to catch her bus. Until that point, she had been working, she had worked up until I think, 10:30 and went to sit in the theatre lounge to wait and let time go by before she could catch her bus.

She went to her bus, did catch it about a quarter to twelve, and this was taking her to the area of her home. She got off, I believe at 7th Street and Marlette. This was sometime after midnight. This was on March 3rd. She said it was about ten minutes after that.

She got off the bus and proceeded to walk east on Marlette towards her home. As she did so, she noticed a car pull out of a parking lot, park down the road. She paid no attention to it apparently, and the next thing she [fol. 64] knew, she had been grabbed by the defendant. He grabbed her arms, put one hand across her mouth and said, "Don't yell, and you won't get hurt."

Ladies and Gentlemen, this is a dark night. This is a dark night; she's eighteen years of age. He takes her to the car, throws her into the back seat, pushes her, I think she said, so that she sprawled out on the seat, and binds her arms behind her back, and also binds her ankles with rope, he got from somewhere in the car.

She then felt a sharp instrument against her neck. Testimony came out, she admitted she did not scream. She was asked why she did not scream. He had his hand across her face and mouth when he first accosted her, and second, she was too frightened to scream.

He then got in the car and drove for about twenty minutes to somewhere in a desert area, at which time he stopped the car, got out, did something a few minutes outside, she doesn't know what he had done, because she testified she was still bound, and that she was lying down facing the back seat.

She then said he got into the car with her, that he had untied her and told her to undress. During this period [fol. 65] of time she testified that she was frightened, that she was scared, that she was crying all this period

of time, and when she did talk to him she begged him to leave her alone.

MR. MOORE: Just a moment, we object to the argument to the jury that she was frightened, she was scared, because the word "fear" has been stricken from the information. Fear doesn't enter into this.

MR. TUROFF: She did testify to it, and I am entitled to argue on the testimony.

THE COURT: I am not sure whether she did or not.

MR. MOORE: The information on motion of the defendant, the word "fear" was stricken from it.

THE COURT: If it is in the evidence, Counsel may comment on it.

MR. TUROFF: If it is not, the jury will remember that. We could have the record searched.

THE COURT: I am not sure whether she said she was or not. I will leave that up to the jury. Go ahead.

MR. TUROFF: She said she had begged him to leave her alone, to let her go, take her home. He told her to undress and she refused to do that. During this period of time she said that she attempted to push him away to [fol. 66] get him away from her, but that he was too strong for her. He apparently over came her. He then proceeded to undress her.

He succeeded in undressing her and then undressed himself, and during this period of time she testified she was crying, she was yelling, she was asking him to let her alone. That is when he proceeded to have this act of sexual intercourse with her. In his statement to the police, he admits these acts; he admits she begged him to leave her alone.

He has this act of sexual intercourse, and the Court will describe what is necessary, what is meant by "penetration" when we talk about it, and when Miss Weir talked about it from the witness stand. The Court will describe to you what that is, what is necessary for that to complete the act of sexual intercourse.

She stated on both direct and cross examination, I believe at first she said that she wasn't sure, the first time he attempted, he got on top of her, she wasn't sure what made penetration. The second time she told me it was

his penis. On cross examination she said she thought it was his penis.

Here is a girl, it is dark out at night, she's frightened, [fol. 67] she's been crying, she's begged him to leave her alone.

She did testify when he started, his hands were around her, so she should be pretty darn scared, and not too certain what was going on in the car at that time.

After he finished, he's through with her. He got out, got dressed, told her to dress and drove to where she said she lived or in the area where he picked her up. She got out of the car, he took off. It was late, she started down the street, started walking. When she got halfway down the block, she ran—she ran home. She first entered the house and she was hysterical. It took fifteen minutes to calm this girl down so she could tell her sister what had happened to her. When she finally told her sister what happened to her, her sister immediately called the police department.

She said at no time did she go with the defendant willingly, at no time did she have this act of intercourse with him willingly, but apparently because he was so strong for her, she was not able to defend herself. She was not able to ward him off; that he did complete the act with her.

You heard her sister, Mrs. Williamson, testify to her [fol. 68] condition, particularly when she got home, her clothes were a mess, her hair was a mess, her makeup was off, and she was in a hysterical condition and could not even relate for about fifteen minutes what had happened to her. When she did so, the police were called.

Then you remember Detective Cooley's testimony as to the conversation that he had with the defendant after the defendant had been brought to the police department some ten days later. He said the lineup was run and that it was viewed by the victim. He then had this talk with Mr. Miranda in which he asked him whether or not he had in fact, raped this girl. Now, here's where—

MR. MOORE: We object to the statement, he had in fact, raped the girl. There is nothing in the testimony to that effect. Mr. Young and Mr. Cooley testified he raped

the girl, but nothing that he said it in the confession to that effect.

MR. TUROFF: I believe the record will show he used these words.

THE COURT: I think one of the officers did use that term. Again, I will submit to the memory of the jury on it. You understand, of course, that arguments of Counsel are not evidence and you should make up your minds what was said from the evidence produced here in [fol. 69] Court. Go ahead, Mr. Turoff.

MR. TUROFF: Now, at this point, the story starts to change a little bit after he's already been apprehended, the story starts to change. He admits it. You have this to take with you to the deliberation room. This is his written statement. You have read it all. He admits seeing the girl walking up the street. He admits stopping a little ahead of her and getting out of the car. He admits grabbing her by the arm.

Here's where the story starts to change. He said he asked her to get into the car. He said she got into the car without force. Here we go back together again—he says he tied her hands and ankles. If you believe she willingly got in the car with him, what was the need of tying her up? Why did he tie her up if she readily went along with what he wanted to do? Anyway he did tie her up and he admits he tied her up.

He said he drove a few miles away from the area of 7th Street and Marlette.

One problem we are faced with is that the girl didn't know where she had been taken to. We must show as far as the rape is concerned, that it happened in the county of Maricopa a few miles from 7th Street and Mar- [fol. 70] lette. We submit it is still in Maricopa County. I believe you can figure it out for yourselves it is still in this county.

Then he says he asked her to take her clothes off, and she didn't do it, so we again have a consistency between his statement to the police and her testimony. He said he started to take her clothes off and without any force. She readily submitted to this, he says. This is, we submit, an attempt on his part to at least take care of the forcible rape aspect.

She testified that she attempted to call him off, push him away, but she couldn't do it, and all during this period of time, she was crying, and she was in a very hysterical frame of mind then.

Then he goes in and asks her to lay down. She did. Again, we submit he said she did it voluntarily. We submit it was not voluntarily, and you heard the evidence on that.

Then he says he did not get his penis in, or he did get it in about a half an inch. I don't want to belabor this point with you, Ladies and Gentlemen. It is necessary that we do go over some of these aspects, but I don't want to belavor it. The Judge will instruct you as to the degree of penetration necessary to complete the act he is charged with.

[fol. 71] But he told her to get her clothes back on and he drove her home. Then he says he couldn't say he was sorry for what he did, but asked her to pray for him. That is the statement you will be able to read.

We submit, Ladies and Gentlemen, that the State has shown by the testimony that you have heard from the victim, the victim's sister who testified, as to the condition after the acts had been completed, that force was used.

The degree of force we submit, is not that degree of force nesessary to render her unconscious. He didn't have to beat her to a pulp. The Statute says that the act is completed where the female's resistance is overcome by force or violence, or where the female is prevented from resisting by threats of immediate or great bodily harm.

MR. MOORE: We object to reading that portion of the Statute because it is not before the Court or jury. No threat of bodily harm is alleged in the information.

We ask for a mis-trial at this time for prejudicial statements by the County Attorney.

THE COURT: I think it would fall within the terms of the second count.

MR. TUROFF: We have alleged it, and we ask you [fol. 72] read the statute.

THE COURT: Go ahead.

MR. TUROFF: This is a portion of what he has been charged with, Ladies and Gentlemen. We ask you then

to, in view of this Statute, to view the evidence that you have heard, to see whether in fact this girl voluntarily—

COLLOQUY BETWEEN COURT AND COUNSEL

MR. MOORE: May I pray the indulgence of the Court just a moment, without the jury, I would like to present this to the Court.

THE COURT: All right, come up.

(Thereupon the following proceedings were had at the bench out of hearing of the jury.)

THE COURT: He pleads rape in the first degree, that is No. 2.

MR. MOORE: No. 3 is not pleaded in this information. The information does not plead No. 3, and any reference to No. 3 is prejudicial to the defendant. On motion the Court struck the word "fear" out of the original complaint.

MR. TUROFF: It is embodied in the Statute. Read it.

MR. MOORE: Just force and violence, that is all the defendant is charged with.

THE COURT: I will have to hold you to that.

MR. TUROFF: That is amended. Read the amend-
[fol. 73] ment.

THE COURT: You haven't framed it in your information.

MR. TUROFF: We pleaded the Statute.

THE COURT: You have limited it here to force and violence. Fear is stricken for some reason.

(Mr. Turoff reads from the Statute.)

MR. MOORE: That is not pleaded.

MR. TUROFF: Doesn't have to be pleaded.

THE COURT: He says you have pleaded No. 2 and you have not pleaded No. 3.

MR. MOORE: You only pleaded force and violence. You have not pleaded the other. Here it is.

MR. TUROFF: If the Court please, we submit the pleading of the Statute 13—6 11, puts the entire Statute in.

THE COURT: I can't go along with you on that. You have limited yourself to certain specific portions of the Statute. You should be limited to that. That will be the ruling anyway. Go ahead.

(Thereupon the following proceedings were had before the jury.)

THE COURT: Ladies and Gentlemen, the remarks of Counsel in respect to resistance of the lady and the over-[fol. 74] coming of resistance by threats of immediate and great bodily harm, or words to that effect, will be stricken from the record, and you are instructed to disregard that.

I will instruct you later on what is necessary to be proved by the State, in order to constitute the crime of first degree rape, but you will disregard these remarks of Counsel. Go ahead.

MR. TUROFF: The only issue you have then in front of you is whether or not she consented, or whether or not the act of sexual intercourse was because her resistance was overcome by force or violence. We submit all the evidence you have heard just recently would indicate that the latter is the correct interpretation, that she did not wilfully get in that car. The inconsistencies between what the defendant said took place and what she tells us today are inconsistencies that are in her favor. If she did wilfully do what he would have you believe she did, there would have been no need for him to tie her up. We submit to you that her acts after she had been dropped off by the defendant, is consistent with the fact she did not go with him wilfully. She did not enter into this act of intercourse with him wilfully, but in fact, she was forced to, by his own force and violence, directed against [fol. 75] her.

Ladies and Gentlemen, the State has two cracks at you, this one, and after the defense has made his remarks, we again have a chance to talk to you. The reason for that is that the State has the burden of proof, and we are given then the privilege of talking to you twice. In case any questions are raised by defense Counsel, I will attempt to clear them up when I talk to you again. Thank you for your attention to this matter.

THE COURT: Mr. Moore.

SUMMATION OF MR. MOORE

MR. MOORE: If the Court please, Counsel for the State, Ladies and Gentlemen of the Jury: As an attorney, and as a father, it is one of the cases I don't like to be involved with, but however, under our legal procedures, regardless of the type of case it is, the defendant is entitled to the best defense that he can have.

You know that perhaps a doctor doesn't enjoy operating for locked bowels, but he has to. Perhaps you, as jurors, do not enjoy sitting on this case, but it is your duty as a citizen to do so, to determine the issues here between the State of Arizona and the accused.

Now, we all perform our proper parts in this little drama. The Court is going to tell you the law. He has [fol. 76] ruled on the admissibility of the evidence, on what we can argue to you about, and you and I both must accept the Court's word as to the law.

The facts we try to bring out to you, both the State's Counsel and myself, the best of our ability, in the manner most favorable to our client, the State of Arizona or the accused. We present to you the argument which is part of the scheme of our jurisprudence in our state. In this Court, we present our argument, not to try to influence you, not to spellbind you with our oratory or to show how intelligent we are, or how we wrap somebody around our fingers on the witness stand, but the purpose of our argument is to assist you in your deliberations in this case, to analyze the testimony, and to weigh it, and to arrive at a proper and a just verdict in your jury room.

Nothing I say is intended to influence you. I am sure the State's Counsel didn't intend to influence you. We want to try to be of some assistance if possible and to do so, I at first go to the meat in the coconut, the issue involved in the case. I would read to you again, the charges in this case, omitting the caption and ginger [fol. 77] bread, so to speak:

(Reading) "The said Ernest Arthur Miranda on or about the 3rd day of March, 1963, and before the filing of this complaint at Northeast Phoenix Precinct, in the County of Maricopa, State of Arizona, did then and there wilfully, unlawfully and feloniously, seize, confine, abduct,

conceal, kidnap or carry away one Patricia Ann Weir for the purpose of raping and did rape said Patricia Ann Weir, said Patricia Ann Weir not being related in any way to said defendant, Ernest Arthur Miranda, all contrary to the provisions of Section 13-492, A'R'S'.

"Count 2: For a further and separate cause of action, being a different offense from, but connected in its commission with the charge set forth in Count 1 hereof, the said Ernest Arthur Miranda is accused by this complaint of the crime of rape, first degree, a felony, committed as follows to wit:

"The said Ernest Arthur Miranda on or about the 3rd day of March, 1963, and before the filing of this complaint at Northeast Phoenix Precinct, in the County of Maricopa, State of Arizona, did then and there wilfully, unlawfully and feloniously, and by force and violence, have [fol. 78] and accomplish an act of sexual intercourse with and upon one Patricia Ann Weir, a female person, who was not then and there the wife of the defendant, without the consent and against the will of the said Patricia Ann Weir, all of which is contrary to the provisions of Section 13-611, A'R'S', as amended, 1962."

Now then, let's follow this and see what they have to prove, what the State has to prove to make their case. The Court will instruct you that the State must prove this charge beyond a reasonable doubt or it will be your duty to return a verdict of not guilty for the defendant.

Now, they have proven this one thing. We admit they have proven that the defendant accosted the prosecuting witness, Patricia Weir, in Maricopa County, in the City of Phoenix.

But in order to make it a kidnapping, he had to do that with the intention to commit a crime, and they allege the crime was rape, and that he did commit the crime of rape in Maricopa County, State of Arizona.

That is on kidnapping, in order to make this a kidnapping, to make this charge kidnapping complete, he must have put her in the vehicle without her consent, forcibly put her in the car, and take her from here to [fol. 79] wherever the sexual intercourse was accomplished, whether it was rape or seduction. But it had to

be rape to make it kidnapping. Seduction is no good. So, they say he took her to a place in Maricopa County where he committed the crime of rape. If they can't prove that beyond a reasonable doubt, it is the duty of this jury to return a verdict of not guilty.

Now, I will ask you where is there one scintilla of evidence that the crime of rape was committed in Maricopa County, Arizona?

The evidence is this, if I remember correctly, and if I misstate it, forgive me. You heard the evidence, you know it better than I do. Patricia Ann Weir testified that they drove from 7th Street and Maryvale, I believe it was up here, some 23 or 25 minutes, to a point in the desert. Where in the desert, she did not know.

And I say to you that from that point to the Yavapai County Line can be driven in less than 25 minutes. And to a point to the Pinal County Line over by Apache Junction can be driven in approximately that time, so there is no evidence before this jury that the crime of rape was committed in Maricopa County, Arizona. Nobody knows where it was committed—somewhere out there 25 minutes [fol. 80] away from where, according to the prosecuting witness, she was first accosted.

Now, let's get down to this crime of rape and see what happens. The Court will instruct you as to the amount of resistance required on the part of the prosecuting witness before she is forced to the act of sexual intercourse. There is no going into the background of Patricia Ann Weir to see whether she's a good girl or a bad girl. We must assume and you must assume she was a good girl, and virtuous up until that time.

But you assume that, you've got to also assume she's going to resist the attentions of this male, the attentions of the defendant. What resistance was shown here? Where did she resist?

Under the law, he could have carried her for two hours and 40 minutes around in the car, all this time, and if a split second before the sexual intercourse occurred, she consented, he didn't forcibly and by force and violence have sexual intercourse with her.

The only evidence of force and violence that you have at all in this case is where he grabbed her by the arm,

I have not consciously said or done anything during this trial which might be considered by you as an indication of my opinion on any question or issue of fact. If, through inadvertence on my part, any of you may have received an impression to the contrary, I instruct you to disregard it, because it is your own opinion that must determine your verdict, and not mine.

You, the jury, are the sole and exclusive judges of the effect and value of the evidence, and of the credibility of the witnesses who have testified in this case. The character of the witnesses as shown by the evidence should be taken into consideration for the purpose of determining their credibility, whether or not they have spoken the truth. The jury may scrutinze the demeanor of witnesses while on the stand, and may consider their relation to [fol. 89] the case, if any, and also their degree of intelligence. A witness is presumed to speak the truth. This presumption however, may be repelled by the manner in which he testifies, by his interest in the case, if any, or his bias or prejudice, if any, for or against the defendant or the State, by the character of his testimony, or by contradictory evidence.

A witness may be impeached also by evidence that at other times he has made statements inconsistent with his present testimony as to any matter material to the cause on trial.

A witness wilfully false in one material part of his or her testimony may be distrusted in others. The jury may reject the whole of the testimony of a witness who has wilfully sworn falsely to a material point. If you are convinced that a witness has stated what was untrue as to a material fact not as a result of mistake or inadvertence, but wilfully, and with a design to deceive, then you may treat all of his or her testimony with distrust and suspicion and reject all, unless you shall be convinced that he or she has in other particulars, sworn to the truth.

On the subject of confessions, a statement made by a defendant outside of this trial which tends to prove his [fol. 90] guilt, may be either an admission or a confession. An admission is something less than a confession

and is but an acknowledgment of a fact which tends only toward proof of the ultimate fact of guilt.

On the other hand a confession by a defendant leaves nothing to be determined in that it is a declaration of intentional participation in the criminal act for which such defendant is on trial, and must be a statement of such in nature that no other evidence than the guilt of the defendant may be drawn therefrom.

If, under my instructions, you find that a voluntary confession was made, you are the exclusive judges as to whether or not the confession was true. The fact that the Court has admitted into evidence the alleged confession of this defendant, does not bind the jury to accept the Court's conclusion, and the jury, before it may take a confession into consideration, must for itself find whether or not it was a voluntary confession.

If the jury concludes that a confession was not made voluntarily, it is the duty of the jury to entirely disregard the same and not consider it for any purpose. This rule does not apply to a statement which does not amount to a [fol. 91] confession, but which merely amounts to an admission. An admission received in evidence may properly be considered by the jury even though it was made involuntarily.

A confession is involuntary when it is obtained by any sort of violence or threats, or by any direct or implied promises of immunity or benefit, or by any improper influence which might induce in the mind of the defendant, the belief or hope that he would gain or benefit or be better off by making a statement, and when the defendant makes such confession as a result of any such inducement originating with a law enforcement officer. But the fact that a defendant was under arrest at the time he made a confession or that he was not at the time represented by Counsel or that he was not told that any statement he might make could or would be used against him, in and of themselves, will not render such confession involuntary.

Where there is a conflict in the evidence, it is for the jury to decide whether the confession was made voluntarily or involuntarily, and in making this determination, the jury should govern its action by the same rules as

to weighing the evidence and credibtility of witnesses as applied to the determination of any of the issues in the case.

Now, the guilt of a defendant may not be established [fol. 92] alone by any confession or admission made by him outside of this trial. Before any person may be convicted of a criminal offense, there must be proof, independent of any such statement, that the crime in question was committed, but it is not necessary that such independent proof include proof as to identity of the person by whom such offense was committed.

There are certain rules applicable to every criminal trial which it is the duty of the jury to apply in this case in determining the questions of fact involved. These rules I will now define to you, and it is your duty to apply them in endeavoring to reach a conclusion in this case.

A defendant in a criminal prosecution is presumed to be innocent until the contrary is proved beyond a reasonable doubt. That presumption of innocence continues with the defendant throughout the trial until the jury, by their verdict, find him guilty, if they do arrive at such a verdict. The defendant is not called upon to establish his innocence. The burden of proving his guilt rests upon the prosecution throughout the case. He is entitled to the benefit of a reasonable doubt upon the whole case, upon all the evidence and lack of evidence in the case, and if [fol. 93] there be a reasonable doubt upon any material question necessary to his conviction, it must be resolved in his favor.

A reasonable doubt is not a mere whim or guess or imaginary doubt, nor is it a mere subterfuge to which resort may be had in order to avoid doing a disagreeable thing. It is such a doubt as reasonable men may entertain after a careful and honest review and consideration of all the evidence in the case. It must be founded in reason and common sense.

The rule of law to which I refer does not require that the defendant be proven guilty beyond all doubt, because in many cases that would be an impossibility. There is nothing human probably that can be said to be beyond all doubt. The law says that the defendant is entitled to the benefit of a reasonable doubt, not all doubt.

If, after going over in your minds the entire case and giving consideration to all the testimony and the evidence, you then feel uncertain and not fully convinced that the defendant is guilty, and believe you are acting in a reasonable manner, and if you believe that a reasonable man in any matter of like importance would hesitate to act because of such a doubt as you are conscious of having, [fol. 94] that is a reasonable doubt of which the defendant is entitled to have the benefit.

Now, Ladies and Gentlemen, the information in this case charges two counts, one of which is the crime of kidnapping, count 1, and briefly and in summary, the essential elements stated in this information are: That on the 3rd day of March, 1963, in this county, the defendant did wilfully, unlawfully and feloniously, seize, confine, abduct, conceal, kidnap, or carry away Patricia Ann Weir, for the purpose of raping her, and did rape her, the said Patricia Ann Weir not being related in any way to the defendant.

Now, the second count alleges the crime of rape in the first degree. Now, the essential elements of this crime as charged in the information are: That the said defendant did no or about the 3rd day of March, 1963 in this county, County of Maricopa, unlawfully and feloniously, and by force and violence, accomplished an act of sexual intercourse upon the female person of Patricia Ann Weir, who was not then the wife of the defendant, and that this was accomplished without her consent and against her will.

The Statutes of the State of Arizona in reference to the crime of kidnapping provide as follows: I will read only [fol. 95] the portions which are material to this case.

"A person except in the case of a minor by a parent who seizes, confines, inveigles, entices, decoys, abducts, conceals, kidnaps or carries away, any individual by any means whatsoever with intent to hold or detain, or who holds or detains such individual for ransom, reward or otherwise, is guilty of kidnapping."

The Statute in respect to the second count which is rape in the first degree reads as follows:

"Rape in the first degree is an act of sexual intercourse accomplished with a female not the wife of the perpetrator under any of the following circumstances:"

Now, the Statute lists several separate circumstances following what I have just read. The Court has ruled that there is only one of these which under the information in this case is pertinent, and that is No. 2, and that reads as follows:

"Where the female resists, but her resistance is overcome by force or violence."

The essential guilt of rape in the first degree consists in the outrage to the person and feelings of the female, and any sexual penetration however slight is sufficient [fol. 96] to complete the crime.

Now, in order to constitute the crime of rape in the first degree by overcoming resistance by force and violence, it must appear that the victim has resisted to the utmost.

In every crime or public offense, there must exist a union or joint operation of conduct and intent. An essential element of the crime with which the defendant is accused is intent, the law requiring that to constitute such a crime, there must exist a criminal intent. However, this does not mean that one must intend all the consequences of his conduct, or that he must know that such conduct is unlawful.

The intent to do the forbidden thing constitutes the criminal intent. The law requires that to be guilty of crime, one must intend the conduct that fits the description of the crime, and must engage in that conduct knowingly and wilfully.

The intent with which an act is done is manifested by the circumstances attending the act, the manner in which it is done, and the means used.

In certain crimes, it is necessary that in addition to the intended act which characterizes the offense, the act must be accompanied by a specific or a particular intent, with- [fol. 97] out which such a crime may not be committed.

Thus, in the crime of kidnapping, a necessary element is the existence in the mind of the perpetrator of the specific intent to hold or detain.

As a matter of fact, there are two situations under this statute. There must be an intent to hold or detain, or the perpetrator must hold or detain such individuals for ransom, reward, or otherwise.

In arriving at a verdict in this case, the subject of penalty or punishment is not to be discussed or considered by you, as that matter is one that lies solely with the Court, and must not in any way affect your decision as to the innocence or guilt of the defendant.

If, after a careful consideration of all the evidence, and applying these instructions, you find beyond a reasonable doubt that the defendant, in the manner and at the time charged in the respective counts of the information, committed the acts charged therein, you should find him guilty. On the other hand, unless you so find beyond a reasonable doubt, you should find him not guilty. And this instruction applies to each separate count of the information.

You will be give four forms of verdict, Ladies and [fol. 98] Gentlemen.

MR. MOORE: If the Court please, may I approach the bench?

THE COURT: You may come right up.

(Thereupon a discussion was had at the bench between Counsel and the Court off the record after which proceedings resumed as follows before the jury.)

THE COURT: It is a constitutional right of a defendant in a criminal trial that he may not be compelled to testify. Thus, whether or not he does testify rests entirely in his own decision. The failure of a defendant to deny or explain evidence against him does not create a presumption of guilt, or by itself warrant an inference of guilt, nor does it relieve the prosecution of its burden of proving every essential element of the crime and the guilt of the defendant beyond a reasonable doubt.

You will be given four forms of verdict, one of which reads as follows: "We, the jury, duly empaneled and sworn in the above entitled action upon our oaths, do find the defendant guilty of rape in the first degree as charged in Count No. 2 of the information."

The second reads as follows: "We the jury, duly empaneled and sworn in the above entitled action upon our [fol. 99] oaths, do find the defendant not guilty of rape in the first degree as charged in count 2 of the information."

Now, the third form reads: "We the jury, duly empaneled and sworn in the above entitled action upon our oaths, do find the defendant guilty of kidnapping as charged in count 1 of the information."

And the last form: "We the jury, duly empaneled and sworn in the above entitled action upon our oaths, do find the defendant not guilty of kidnapping as charged in count 1 of the information."

I notice I read count 2 first, but that is not material.

MR. MOORE: May the jury take the exhibit to the courtroom with them, Your Honor?

THE COURT: On retiring to your jury room, you will select one of your fellow jurors to act as Foreman who will preside over your deliberations, and who will sign the verdict to which you agree. In order to return a verdict, it is necessary that all twelve of the jurors agree to a decision, and as soon as all of you have agreed upon a verdict, have it signed by your Foreman and notify the bailiff who has you in charge, and you will be returned [fol. 100] to this room, and your verdict or verdicts will be delivered in open court.

You will be entitled to the exhibits which were introduced into evidence. There is just one. All right, you will be entitled to take that to the jury room.

Swear the bailiffs.

(Thereupon the bailiffs were sworn.)

THE COURT: You may now retire with the bailiffs.

(Thereupon the jury retires to deliberate of their verdict at 3:37 o'clock p.m.)

THE COURT: The Court will be in recess.

(Thereupon Court was recessed.)

[fol. 101]

[Court Reporter's Certificate (omitted in printing)]

[fol. 101A]

STATE'S EXHIBIT 1

CITY OF PHOENIX, ARIZONA
POLICE DEPARTMENT

Form 2000-66-D
Rev. Nov. 59

Witness/Suspect
Statement

SUBJECT: Rape D.R. 63-08380

STATEMENT OF: Ernest Arthur Miranda

TAKEN BY: C. Cooley #413—W. Young #182

DATE: 3-13-63 TIME: 1:30 P.M.

PLACE TAKEN: Interr Rm #2

I, Ernest A. Miranda, do hereby swear that I make this statement voluntarily and of my own free will, with no threats, coercion, or promises of immunity, and with full knowledge of my legal rights, understanding any statement I make may be used against me.

I, Ernest A. Miranda, am 23 years of age and have completed the 8th grade in school.

E.A.M. Seen a girl walking up street stopped a little ahead of her got out of car walked towards her grabbed her by the arm and asked to get in the car. Got in car without force tied hands & ankles. Drove away for a few miles. Stopped asked to take clothes off. Did not, asked me to take her back home. I started to take clothes off her without any force and with cooperation. Asked her to lay down and she did could not get penis into vagina got about ½ (half) inch in. Told her to get clothes back on. Drove her home. I couldn't say I was sorry for what I had done. But asked her to say a prayer for me. E.A.M.

I have read and understand the foregoing statement and hereby swear to its truthfulness.

/s/ Ernest A. Miranda

WITNESS: /s/ Carroll Cooley
/s/ Wilfred M. Young #182

[fol. 102]

IN THE SUPERIOR COURT
MARICOPA COUNTY, ARIZONA
Div- 10 Judge McFate
Criminal Case No. 41948

THE STATE OF ARIZONA, PLAINTIFF

vs.

ERNEST ARTHUR MIRANDA, DEFENDANT

JUDGMENT OF GUILT AND SENTENCE—June 27, 1963

On the 27th day of June, 1963, the hereinafter named defendant personally appeared before the court (with his attorney) Alvin Moore.

The State of Arizona was represented by (Deputy) County Attorney .....

The following proceedings were had:

The defendant was informed that he had heretofore (been tried and found guilty of) the offense specified in this judgment, which the defendant acknowledged to be correct. The following judgment of guilt was then entered in the presence of the defendant:

IT IS THE JUDGMENT of the court that the defendant Ernest Arthur Miranda is guilty of COUNT I—KIDNAPPING, AND COUNT II: RAPE (First Degree) Felonies as charged in the (Information).

The defendant was asked whether he had anything to say or any legal cause to show why sentence should not be pronounced. There was none.

IT IS THE JUDGMENT AND SENTENCE OF THE COURT, that as to Count I the defendant serve a term in the Arizona State Prison at Florence, Arizona, of not less than twenty (20) years nor more than Thirty (30) years; and that on Count II, that you serve a term in the Arizona State Prison, at Florence, Arizona, of not less than Twenty (20) years nor more than Thirty (30) years, said sentences on Counts I and II to run concurrently. Defendant is remanded to the Sheriff.

/s/ Yale McFate
Judge

[fol. 103]

IN THE SUPERIOR COURT OF THE STATE OF ARIZONA IN AND FOR MARICOPA COUNTY

No. 41948

[File Endorsement Omitted]

* * * *

NOTICE OF APPEAL—Filed August 2, 1963

TO THE CLERK OF THE SUPERIOR COURT:

NOTICE IS HEREBY GIVEN that the above named defendant appeals to the Supreme Court of the State of Arizona from the verdict, judgment and sentence, and all proceedings connected therewith, said judgment and sentence being entered and rendered by the above entitled Court on the 27th day of June, 1963, wherein the defendant was adjudged guilty of COUNT I, KIDNAPPING and COUNT II RAPE (FIRST DEGREE), felonies, and sentenced to serve a term in the Arizona State Penitentiary, and the whole of the procedure.

Dated this 2nd day of August, 1963.

/s/ Alvin Moore
ALVIN MOORE
Attorney for defendant
2125 West Monroe Street
Phoenix 9, Arizona

[Certificate of Service (Omitted in Printing)]

In State v. Jacobs, supra, we stated:

> "We therefore now hold that the crime of kidnapping with intent to commit rape may be charged under A.R.S. § 13-492, subd. A." 93 Ariz. at 341, 380 P.2d at 1002.

The history and reason for the broadening of the kidnapping statute was well set forth in the Jacobs case. The information properly referred to "rape" because that was the purpose of the kidnapping. The use of the words "and did rape" was no more inflammatory than the allegation "for the purpose of raping," which was necessary and proper, as held in Jacobs, supra. The commission of rape was charged in Count II, and so defendant could not have been prejudiced by the use of the word in Count I. The objection to the other language—namely, "not being related in any way to the defendant"—certainly is without foundation. The only object of the allegation was to show that the case did not fall within the exception, i.e., the taking of a minor by a parent. Under no stretch of the imagination could these words be construed as inflammatory, as contended by defendant.

As to the second part of the information charging the crime of rape, defendant contends that because originally the word "fear" was in the information it was prejudicial. However, defendant made a motion to quash the information, and, on May 2d, before the trial, the court entered an order denying defendant's motion to quash but ordered the word "fear" to be stricken from the information. Hence the information upon which defendant was tried [fol. 109] and which was read to the jury did not contain the word "fear." So the word "fear" originally in the information could not have had any prejudicial effect. The case was submitted under proper instructions defining rape under A.R.S. § 13-611, Para. 3, namely:

> "3. Where the female resists, but her resistance is overcome by force or violence." 5 A.R.S. 255

Defendant contends that it was error to deny his motion to dismiss the action on the ground that the case was

not brought to trial within the sixty days provided for under Rule of Criminal Procedure, No. 236, which reads:

> "When a person has been held to answer for an offense, if an information is not filed against him for the offense within thirty days thereafter, or when a person has been indicted or informed against for an offense, if he is not brought to trial for the offense within sixty days after the indictment has been found or the information filed, the prosecution shall be dismissed upon the application of such person, or of the county attorney, or on the motion of the court itself, unless good cause to the contrary is shown by affidavit, or unless the action has not proceeded to trial because of the defendant's consent or by his action. When good cause is shown, the action may be continued, in which event the defendant if bailable shall be released on bail either on his own recognizance or on the undertaking of sureties." 17 A.R.S. 456 (1956)

This contention is without merit, as defendant made application for a sanity hearing under Rules of Criminal Procedure, No. 250, 17 A.R.S. 468 (1956), just one week prior to the time of the original trial setting. The trial setting was well within the 60-day period. It was defendant's application for the sanity hearing which caused the delay. At the hearing on this application, and without objection of defendant's counsel, a new date for trial was set—June 10, 1963—which was also within the 60-day period. One of the medical reports was not filed until June 7, 1963. Defendant was thereafter promptly tried—[fol. 110] just two days after the ruling was made on the motion for the sanity hearing. Thus, it is evident that the delay of the trial was due to defendant's waiting until just one week before trial date to make his motion for the sanity hearing. This was good cause for continuance. Even with the delay occasioned by defendant's own action, trial was held June 20, 1963, only five days beyond the 60-day period. Where good cause is shown, under Rules of Criminal Procedure, No. 236, an action may be continued. Westover v. State, 66 Ariz. 145,

185 P.2d 315; Power v. State, 43 Ariz. 329, 30 P.2d 1059.

Defendant contends that there was prejudicial error committed by the deputy county attorney when he argued before the jury that the victim acquiesced in the act due to fear. Defendant contends that this argument, notwithstanding the court's instruction to disregard it, was so prejudicial and inflammatory as to deny defendant a fair and impartial trial. We cannot agree with defendant's interpretation. Certainly the testimony justified the county attorney's conclusion of fear. There was such testimony by the complaining witness as: "He had my hands behind my back, and one hand over my mouth, and stated pulling me toward the car"; "He tied my hands and my ankles, after he got out, he put this sharp thing to my neck and said 'Feel this' . . . I kept screaming 'Please let me go,' "; and when he was undressing her, she stated she was crying again and said "Please don't." This court has repeatedly held that attorneys are given a wide latitude in their arguments to the jury. State v. Dowthard, 92 Ariz. 44, 373 P.2d 357; State v. Thomas, 78 Ariz. 52, 275 P.2d 408; State v. McLain, 74 Ariz. 132, 245 P.2d [fol. 111] 278. In addition, any possible prejudice was corrected by the court's prompt instruction to discharged, coupled with the instructions given at the close of trial, viz., limiting the jury's consideration to the offense charged—Rape, A.R.S. § 13-611, Para. 3.

Defendant contends that the verdict is unsupported by the evidence, viz., there is no showing that the victim resisted the perpetration of the rape. This court cannot find merit in this contention. The victim testified that she pushed against defendant with her hands, and kept screaming; that she was trying to get away, and she testified that he was a lot stronger than she was, and she could not do anything. She also testified to penetration and defendant's confession showed penetration. These were questions for the jury, and the jury decided against defendant. We have repeatedly held that all inferences must be construed in the light most favorable to sustaining the verdict, and that where there is evidence to support a verdict we will not disturb a finding of a jury. State v. Hernandez, 96 Ariz. 28, 391 P.2d 586; State v. Maxwell, 95 Ariz. 396, 391 P.2d 560.

Defendant contends that admission into evidence of his written confession was error for the reason that he did not have an attorney at the time the statement was made and signed. The police officers Young and Cooley testified to oral statements made to them before the signing of the written confession. Their testimony was substantially the same. They first saw defendant at his home at 2525 West Maricopa on March 13, 1963, when they went there for the purpose of investigating a rape. They took defendant to the police station and placed him in a "line-up" with "four other Mexican males, all approxi- [fol. 112] mately the same age and height, build," and brought in the complaining witness who identified him as the one who had perpetrated the acts against her. Then they immediately interrogated him. They advised him of his rights. They testified that he made the statement of his own free will; and that there were no threats, or use of force and coercion, or promises of immunity; that they had informed him of his legal rights and that any statement he made might be used against him.

The oral statement by defendant, as related to police officers, is set forth in the testimony of Detective Carroll Cooley:

> "A He saw this girl walking on the street, he said, so he decided he would pull up ahead of her and stop. He stopped and got out of his car and opened the back door of his automobile. He said when the girl approached him he told her, he said, 'Don't make any noise, and get into the car,' and he said she got into the car, he said, in the back seat.
>
> "After getting into the car, he said he took a small rope he had inside the car and he tied her hands and her ankles, then he got into the front seat behind the driver's wheel and he drove to a location several miles from there in the northeast direction to the area of a desert.
>
> "Q Did he tell you what street this took place on?
>
> "A He didn't know the street. I asked him the street, and he didn't know the name of the street, he didn't know exactly where he was located when

he stopped. It was just in the desert area, couple of miles from where he picked the girl up.

"He said then when he got there he noticed that the girl was untied, and he got into the back seat and he asked her if she would, or he told her to take her clothes off and she said, 'No, would you please take me home?'

"He said then he took her clothes off for her. After he had undressed her, she began to cry, and started [fol. 113] begging him to not do this. She said she had never had any relations with a man before.

"He said he went ahead and performed the act of intercourse, and in so doing was only able to get about a half inch of his penis in and at which time he said he did reach a climax, but he didn't believe that he had reached a climax inside of her.

"He said after the act of intercourse, he then told her to get dressed and asked her where she lived and she told him in the area, she told him 10th or 12th Street. He couldn't remember where, so he said he drove her back to the area where he picked her up and dropped her off in that general area.

"When he started to let her out, why she told him, 'Well, this is not where I live.'

"He said, 'This is as far as I am taking you,' and then he asked her if she would pray for him. She got out of the car and he left and he said then he went home.

"Q Was that the essence of the conversation you had with him at that time?

"A That was the essence of the conversation.

"Q Officer, was this conversation reduced, or was the defendant's conversation with you reduced to writing?

"A Yes, Sir, it was.

"Q Who wrote it down, Officer?

"A He wrote his own statement down.

"Q He wrote it down?

"A Yes, Sir.

"Q Were you present, Officer, when he wrote this?

"A Yes, Sir, I was."

This oral statement was corroborated by the testimony of Officer Young. At the conclusion of Officer Cooley's testimony the statement of defendant was offered in evidence. Officer Cooley was examined on voir dire, as follows:

"Q Is this the statement that you said the defendant reduced to writing?

[fol. 114] "A Yes, Sir, it is.

"[Prosecuting Attorney]: At this time, State will move to introduce the exhibit in evidence.

"[Defense Attorney]: May I ask some questions on voir dire?

"THE COURT: Yes, you may.

"[Defense Attorney]: Q Officer Cooley, in the taking of this statement, what did you say to the defendant to get him to make this statement?

"A I asked the defendant if he would tell us, write the same story that he had just told me, and he said that he would.

"Q Did you warn him of his rights?

"A Yes, Sir, at the heading of the statement is a paragraph typed out, and I read this paragraph to him outloud.

"Q Did you read that to him outloud?

"A Yes, Sir.

"Q But did you ever, before or during your conversation or before taking this statement, did you ever advise the defendant he was entitled to the services of an attorney?

"A When I read—

"Q Before he made any statement?

"A When I read the statement right there.

"Q I don't see in the statement that it says where he is entitled to the advise of an attorney before he made it.

"A No, Sir.

"Q It is not in that statement?

"A It doesn't say anything about an attorney. Would you like for me to read it?

"Q No, it will be an exhibit if it is admitted and the jury can read it, but you didn't tell him he could have an attorney?"

The signed statement admitted in evidence is as follows:

[fol. 115] "I, Ernest A. Miranda, do hereby swear that I make this statement voluntarily and of my own free will, with no threats, coercion, or promises of immunity, and with full knowledge of my legal rights, understanding any statement I make may be used against me.

"I, Ernest A. Miranda, am 23 years of age and have completed the 8th grade in school.

"Seen a girl walking up street stopped a little ahead of her got out of car walked towards her grabbed her by the arm and asked to get in the car. Got in car without force tied hands & ankles. Drove away for a few miles. Stopped asked to take clothes off. Did not, asked me to take her back home. I started to take clothes off her without any force, and with cooperation. Asked her to lay down and she did. Could not get penis into vagina got about ½ (half) inch in. Told her to get clothes back on. Drove her home. I couldn't say I was sorry for what I had done. But asked her to say a prayer for me.

"I have read and understand the foregoing statement and hereby swear to its truthfulness.

/s/ Ernest A. Miranda

"WITNESS: /s/ Carroll Cooley
/s/ Wilfred M. Young, #182"

It will be noted that the only objection made to the testimony was in regard to the narrative form of the answers. The record shows the trial court did not err in the exercise of its discretion in the admission of this evidence.

The only objection made to the introduction of the signed statement was:

> "We are objecting because the Supreme Court of the United States says the man is entitled to an attorney at the time of his arrest."

No objection was made on the ground that the statement was not shown to be voluntary, and no request was made for a determination of the voluntariness of the confession outside of the presence of the jury.

[fol. 116] In State v. Owen, 96 Ariz. 274, 394 P.2d 206, after the Supreme Court of the United States (84 S.Ct. 1932) granted a petition for a writ of certiorari, judgment was vacated, and the case remanded for further proceedings not inconsistent with the opinion in Jackson v. Denno, 84 S.Ct. 1774, 378 U.S. 368, and, in accordance with the mandate of the U. S. Supreme Court, we held:

> "However, since the Supreme Court vacated the judgment of this Court [Jackson v. Denno, 84 S.Ct. 1774] we are of the opinion that it was intended that we follow the rule that statements or admissions, which have been induced by a method in violation of a defendant's constitutional rights, are subject to the same exclusionary rule as a confession. (Cases cited.)" 96 Ariz. at 276, 394 P.2d at 207.

In the instant case request was not made for a determination of the voluntariness of the testimony out of the presence of the jury, nor was its voluntariness questioned or evidence offered to prove it involuntary. No question was presented to the court—either from the evidence or by the attorney—suggesting that there should be a determination as to the voluntariness of the evidence, and no request was made therefor. Officers Cooley and Young had testified to substantially the same facts as were contained in the written statement without objection except to the form of the questions. In his appeal, defendant's

only contention is that he did not have an attorney. The evidence clearly shows that the statement was voluntary. The officers testified that there were no threats or use of any force or coercion, and no promise of immunity; that defendant was advised of his rights, and that any statement he made might be used against him. The record [fol. 117] in this case, and the companion robbery case, No. 1397, shows that defendant was identified, interrogated, and signed confessions in both cases in approximately two hours.

The procedure to be followed in regard to confessions is clearly set forth in State v. Owen, supra, where we held, in line with Jackson v. Denno, supra, that:

> ". . . when a question is raised as to voluntariness of a statement constituting either admissions against interest, exculpatory or otherwise, or a confession, it must be resolved by the judge outside the presence of the jury. If he determines it was involuntary, it will not be admitted. If he determines it was voluntary, it may be admitted." 96 Ariz. at 277, 394 P.2d at 208.

Counsel for defendant evidently determined that the statement was voluntary, or he would have made a request for a hearing out of the presence of the jury. There not having been an issue presented in regard to voluntariness —either from evidence or by request made for a hearing on its voluntariness—and a proper foundation having been laid for its introduction, there was no question to be determined by the court. The failure of the court to give such a hearing is not assigned as error in this case. The only question presented is whether it is proper to admit a statement voluntarily made where defendant did not have an attorney at the time he signed the statement.

The facts of Jackson v. Denno, supra, were different from those of the instant case. In that case there was a serious question in regard to whether the confession was voluntary, so the court laid down the rule which was followed by this court in the Owen case. We held that when requested there must first be a determination by the [fol. 118] court in the absence of the jury as to whether

a statement was voluntary. If it were involuntary, that ended the matter. If the court determined it to be voluntary, following the Massachusetts rule, we held it was still the duty of the court to submit the question again to the jury, and the jury might reject it on the grounds that it was involuntary.

The voluntariness and the truth of the confession were not denied. However, the defendant did not have an attorney at the time he made the confession. The sole question before the court, then, is whether there was a violation of the rights of defendant under the Sixth and Fourteenth Amendments to the Constitution by the admission of the voluntary statement made without an attorney.

We recognize that in passing upon constitutional provisions applicable to the instant case it is our duty to follow the interpretations of the Supreme Court of the United States. There is a long list of these cases, the most recent of which are Escobedo v. State of Illinois (1964) 378 U.S. 478, 84 S.Ct. 1758, 12 L.Ed.2d 977; and Massiah v. United States (1964) 377 U.S. 201, 84 S.Ct. 1199, 12 L.Ed.2d 246.

In Massiah, supra, the court held invalid a conviction on statements which were secured by placing a hidden radio microphone in a co-defendant's car so that government agents could pick up a conversation between defendants. Indictment already had been returned, and counsel retained by defendant. The Massiah case is not in point. The defendant in that case was not aware that his con- [fol. 119] versation was being picked up by the government agents, and he had not been put on notice that what he was saying might be used against him, nor did he know that the federal agents were eavesdropping on his conversation. Under these circumstances it was evident that he did not know his statement might be used against him, and the court held that such an incriminating statement was inadmissible.

In the Escobedo case, supra, defendant's brother-in-law had been fatally shot on January 19, 1960. Defendant had been arrested at 2:30 a.m. the next morning without a warrant and interrogated. He was released at 5:00 p.m.

S.Ct. 1758, 12 L.Ed.2d 977 (1964). This contention is without merit since there is no evidence that he ever requested counsel. See Green v. State, supra, and Mefford and Blackburn v. State, 235 Md. 497, 201 A.2d 824 (1964).

"Careful inspection of the record concerning the circumstances surrounding the giving of the confession reveals no evidence that it was not freely and voluntarily made. There is no evidence that the appellant ever asked to contact his family or requested food. He was not questioned by relays of officers. According to the police testimony and the [fol. 124] written confession itself, the appellant was advised that his statement must be voluntary, that there would be no threats or promises, and that it could be used in a court of law against him. There was no contradictory evidence. The trial court's finding that the confession was voluntary was supported by the evidence." 205 A.2d at 285

We also note the interpretation of the federal court of the effect of the Escobedo case, as set forth in Jackson v. United States, 337 F.2d 136 (1964).

"Defense counsel moved to suppress 'any and all confessions and admissions written or oral obtained by the United States since the date of his arrest and presentation to a committing magistrate.' As grounds for the motion, appellant claimed that the confessions and admissions were elicited from him 'involuntarily' in violation of the Fifth Amendment and of the appellant's right to counsel under the Sixth Amendment. [337 F.2d at 138]

* * * *

"Obviously neither *Escobedo* nor *Massiah* can be read as barring use of this appellant's confession. Many, learned in the law, deeply believe that no accused should be convicted out of his own mouth. But the Supreme Court has never announced any such proposition—not even where the accused had no attorney and had received no Rule 5 'judicial caution.' United

States v. Mitchell, 322 U.S. 65, 70, 64 S.Ct. 896, 88 L.Ed. 1140 (1944). We said as much ourselves only a month ago in Ramey v. United States, 118 U.S. App. D.C. ——, 336 F.2d 743 (1964), cert. denied, 85 S.Ct. 79 (1964) and see United States v. Carignan, 342 U.S. 36, 72 S.Ct. 97, 96 L.Ed. 48 (1951) where Rule 5 advice had been imparted. If there were a rule that a confession may not be received *if made by an accused without counsel*, that would be the end of this case—and of scores like it.

"We conclude that no rule of law required the exclusion of this appellant's confession, voluntarily made, after he had been warned by the F.B.I., the police and the United States Commissioner acting pursuant to Rule 40 (b). He had not requested that counsel be appointed; he had retained no lawyer; that one was not then appointed for him denied him no right; and as the law now stands, there is no automatic rule of exclusion which will bar use of such a confession by an accused who has no lawyer, under circumstances such as appear on the record before us." 337 F.2d at 140

[fol. 125] Other cases, in interpreting the effect of Massiah and Escobedo, have held that the test of admissibility of a statement was not whether defendant had counsel but whether the statement was in effect voluntary, some even holding that it was not necessary that he be warned that it might be used against him. People v. Hartgraves, 31 Ill.2d 375, 202 N.E.2d 33; People v. Agar, 44 Misc.2d 396, 253 N.Y.Supp.2d 761; Commonwealth (Pa.) v. Patrick, 206 A.2d 395; United States v. Konigsberg, supra; Fox v. State, 131 N.W.2d 684 (Iowa); Worley v. State, 132 N.W. 2d 764 (Nebr.).

What is the purpose of the right to counsel? What is the purpose of the Sixth and Fourteenth Amendments? Without question it is to protect individual rights which we cherish, but there must be a balance between the competing interests of society and the rights of the individual. Society has the right of protection against those who roam the streets for the purpose of violating the law, but that

protection must not be at the expense of the rights of the individual guaranteed under the Sixth and Fourteenth Amendments to our Constitution.

In Bean v. State (Nev.), 398 P.2d 251 (1965), the court, after discussing the Escobedo case, stated:

> "Here it is true that the investigation had begun to focus upon Bean; that he had been taken into police custody; that the police were about to commence a process of interrogation to elicit incriminating state-
> [fol. 126] ments, and did so; that Bean was not warned of his absolute constitutional right to remain silent. However, Bean did not request counsel, nor was he denied the assistance of counsel. Absent such a request, and denial of counsel, the rule of Escobedo does not apply.
>
> * * * *
>
> "In Morford v. State, 80 Nev. ——, 395 P.2d 861, we discussed the Dorado case, pointing out that it is an extension of the rule announced in Escobedo, and chose not to follow it." 398 P.2d at 254.

We are familiar with the case of State of California v. Dorado, 40 Cal. 264, 394 P.2d 952, and, like the Supreme Court of Nevada, do not choose to follow Dorado in the extension of the rule announced in Escobedo, supra.

It will be noted in the discussion of these cases—particularly the Escobedo case—the ruling of the court is based upon the circumstances of the particular case. The court, in making its holding in the Escobedo case, stated "under the circumstances here the accused must be permitted to consult with his lawyer." Most of the cases distinguish the Escobedo case on the grounds that the defendant requested and was denied the right to counsel during interrogation. The Escobedo case merely points out factors under which—if all exist—it would not be admissible. We hold that a confession may be admissible when made without an attorney if it is voluntary and does not violate the constitutional rights of defendant.

Each case must largely turn upon its own facts, and the court must examine all the circumstances surrounding the taking of the statement in determining whether it is

voluntary, and whether defendant's constitutional rights have been violated.

[fol. 127] The facts and circumstances in the instant case show that the statement was voluntary, made by defendant of his own free will, that no threats or use of force or coercion or promise of immunity were made; and that he understood his legal rights and the statement might be used against him. Under such facts and circumstances we hold that, notwithstanding the fact that he did not have an attorney at the time he made the statement, and the investigation was beginning to focus upon him, defendant's constitutional rights were not violated, and it was proper to admit the statement in evidence.

Judgment affirmed.

.....

ERNEST W. MACFARLAND, Justice

CONCURRING:

.....

LORNA E. LOCKWOOD, Chief Justice

.....

FRED C. STRUCKMEYER, JR.
Vice Chief Justice

.....

CHARLES C. BERNSTEIN, Justice

.....

JESSE A. UDALL, Justice

[fols. 128-129]

[Triple Certificate (Omitted in Printing)]

[fol. 130]

SUPREME COURT OF THE UNITED STATES

No. 419 Misc., October Term, 1965

ERNESTO A. MIRANDA, PETITIONER

v.

ARIZONA

On petition for writ of Certiorari to the Supreme Court of the State of Arizona.

ORDER GRANTING MOTION FOR LEAVE TO PROCEED IN FORMA PAUPERIS AND GRANTING PETITION FOR WRIT OF CERTIORARI—November 22, 1965

On consideration of the motion for leave to proceed herein *in forma pauperis* and of the petition for writ of certiorari, it is ordered by this Court that the motion to proceed *in forma pauperis* be, and the same is hereby, granted; and that the petition for writ of certiorari be, and the same is hereby, granted. The case is transferred to the appellate docket as No. 759 and placed on the summary calendar.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

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JOHN F. DAVIS, C

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1965

PETITION NOT PRINTED
RESPONSE NOT PRINTED

No. 759

ERNESTO A. MIRANDA,

Petitioner,

vs.

THE STATE OF ARIZONA,

Respondent.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF ARIZONA

BRIEF FOR PETITIONER

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American Civil Liberties Union, "Secret Detention by the Chicago Police." (Free Press, Glencoe, Ill., 1959) 44

Birzon, Kasanof and Forma, *The Right to Counsel*, 14 Buff. L.Rev. 428 (1965) 38

Rep. Emanuel Celler, *Federal Legis. Proposals*, 45 Minn. L.Rev. 697 (1961) 38

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Weisberg, "Police Interrogation of Arrested Persons," *Police Power and Individual Freedom* (Sowle Ed. 1962) 39, 45

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1965

No. 759

ERNESTO A. MIRANDA,

Petitioner,

vs.

THE STATE OF ARIZONA,

Respondent.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF ARIZONA

BRIEF FOR PETITIONER

Opinion

This is a certiorari to the Supreme Court of Arizona, to review a decision reported at 98 Ariz. 18, 401 P. 2d 721, and reprinted R. 72.

Jurisdiction

Certiorari has been granted to review a judgment of the Supreme Court of Arizona in a criminal case, entered on April 22, 1965, which became final on May 7, 1965. The petition for writ of certiorari, filed in July of 1965, was granted on November 22, 1965, and the case, in forma pauperis, was placed on the appellate docket and summary

calendar. The issue is whether the conviction of petitioner violates his constitutional rights under the Sixth and Fourteenth Amendments to the Federal Constitution. This Court has jurisdiction under 28 U.S.C. Sec. 1257(3).

Constitutional Provisions Involved

"In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining Witnesses in his favor, and to have the Assistance of Counsel for his defence." (U.S.C. Const. Amend. VI.)

"All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws." (U.S.C. Const. Amend. XIV, Sec. 1.)

Question Presented

Whether the confession of a poorly educated, mentally abnormal, indigent defendant, not told of his right to counsel, taken while he is in police custody and without the assistance of counsel, which was not requested, can be

admitted into evidence over specific objection based on the absence of counsel?

Statement

A. Proceedings on Interrogation and Trial.

Petitioner was charged with having kidnapped and raped an eighteen year old girl in the vicinity of Phoenix, Arizona, on March 3, 1963.

A psychiatric report, made by a court-appointed psychiatrist (R. 6-9), gives the background of petitioner. Miranda, an indigent, was 23 years old at the time of the interrogation, and working as a truck driver and warehouseman. He had completed eighth grade and started on ninth grade before dropping out of school. Petitioner has a considerable sexual preoccupation, as illustrated in his interpretation of certain proverbs;[1] he has been involved in a series of sex offenses. The doctor concluded that petitioner "has an emotional illness. I would classify him as a schizophrenic reaction, chronic, undifferentiated type" (R. 9).

Petitioner was, at the time of his apprehension, suspected of another, wholly unrelated crime. That incident, the robbery of a woman, may also have involved a threat of rape. The robbery occurred several months before the instant episode (R. 6-7). On March 13, 1963, defendant was arrested at his home and taken in custody to the police station where he was put in a lineup consisting of four per-

[1] "A rolling stone gathers no moss" is interpreted by Miranda to mean "if you don't have sex with a woman, she can't get pregnant." The proverb "people in glass houses shouldn't throw stones" is interpreted by Miranda to mean, "a person with one woman shouldn't go to another woman." Apart from this preoccupation, petitioner also believes that "a stitch in time saves nine" means "if you try to shut something in, you keep it from going out" (R. 8-9).

sons.[2] He was there confronted and identified by the two complaining witnesses, the one for robbery and the other for rape. Miranda was then taken to Interrogation Room 2 at the local police headquarters (R. 37) and there interrogated on both matters.

The two matters were at first consolidated in the trial court, with one sanity examination covering both, but were later separated for trial. (See report in 401 P. 2d at 718.) The petitioner was convicted of both offenses in separate trials. The two cases were treated by the Supreme Court of Arizona as companions; *State* v. *Miranda*, 98 Ariz. 11, 401 P. 2d 716 (not this case) and 98 Ariz. 18, 401 P. 2d 721 (this case), both decided on April 22, 1965.

Only the kidnapping-rape case has been brought here. However, since the interrogation was joint, some reference needs to be made to the other record, and, with the consent of opposing counsel, an extract has been tendered to this Court. It is reprinted as an appendix to this brief and is the basis of this paragraph. After the lineup, it was Officer Cooley, who had arrested Miranda, who took petitioner to Interrogation Room 2. There he and Officer Young conducted the questioning. Officer Young did not tell Miranda that anything he said would be held against him, nor did he tell Miranda of his right to consult an attorney (Appendix, reproduction of Transcript, p. 48). Officer Young believes that Miranda was told that he need not answer their questions (Appendix, reproduction of Transcript, p. 60) but no mention was made of the right to counsel.

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[2] See R. 37, 38 where police officers refer variously to custody and arrest. Under Arizona law, custody is arrest; see Rule 14, Arizona Rules of Criminal Procedure, Vol. 17, Ariz. Rev. Stat. p. 175; and Ariz. Rev. Stat. Sec. 13-1401.

The absence of advice to petitioner regarding his right to counsel is amplified by the record in the instant case. Here, Officer Cooley also testified as to interrogation in Room 2 of the Detective Bureau (R. 37), and narrated extensively a confession he attributed to the petitioner (R. 38-40). A written statement,[3] obtained from Miranda while he was under the interrogation in Room 2, was then put into evidence (R. 40, R. 69). Officer Young confirmed that defendant was not told of any right to advice of counsel (R. 45). When the confession was offered into evidence, defense counsel expressly objected "because the Supreme Court of the United States says a man is entitled to an attorney at the time of his arrest." The confession was admitted over this objection (R. 41). In summation, the prosecutor emphasized to the jury the officer's testimony as to the interrogation, and the written confession (R. 50-51).

The two cases, the robbery and the rape-kidnapping, were tried by this same judge. In the instant case Miranda was given a sentence of twenty to thirty years, and in the robbery case he was given a sentence of twenty to twenty-five years. He thus faces imprisonment of forty to fifty-five years.

B. Proceedings in the Arizona Supreme Court.

The Arizona Supreme Court, setting forth the language of both the oral and the written confessions at length (R.

[3] The written confession says, "I started to take clothes off her without any force and with cooperation. Asked her to lay down and she did. Could not get penis into vagina got about ½ (half) inch in." It strains credulity to the breaking point to believe that this sentence was the product of a man of petitioner's mentality and comprehension as indicated by his answers to the questions set forth in footnote 1.

79-82), considered the admissibility of the confessions under the decisions of this Court. It held that *Escobedo* v. *Illinois*, 378 U.S. 478, 84 Sup. Ct. 1758, 12 L. Ed. 2d 977 (1964) was "a controlling precedent" only where five elements occur, one of which is that "The suspect must have requested and been denied the opportunity to consult with his lawyer" (R. 87). This element being absent, the court held that:

> "[N]otwithstanding the fact that he did not have an attorney at the time he made the statement, and the investigation was beginning to focus upon him, defendant's constitutional rights were not violated, and it was proper to admit the statement in evidence" (R. 93).

Accordingly, Miranda's conviction was affirmed.

Summary of Argument

There is a right to counsel for arrested persons when interrogated by the police. The law has been growing in this direction for more than thirty years. The federal experience from *Johnson* v. *Zerbst*, 304 U.S. 458, 58 Sup. Ct. 1019, 82 L. Ed. 1461 (1938) through the series of cases culminating in *Mallory* v. *United States*, 354 U.S. 449, 77 Sup. Ct. 1356, 1 L. Ed. 2d 1479 (1957), and the Public Defender Act of 1964 (78 Stat. 552, 18 U.S.C. Sec. 3006A), and applying Federal Criminal Rules 5 and 44, amount to a requirement that all defendants be informed of their right to counsel and be given counsel swiftly upon their arrest. In the states, *Powell* v. *Alabama*, 287 U.S. 45, 53 Sup. Ct. 55, 77 L. Ed. 158 (1932) asserted as a constitutional requirement of state procedure that a person charged with a capital crime have "the guiding hand of counsel at every step in the proceedings against him." 287 U.S. at 69. This

requirement was buttressed by repeated decisions of this Court that it would accept no forced confessions, *Brown* v. *Mississippi*, 297 U.S. 278, 56 Sup. Ct. 461, 80 L. Ed. 682 (1936), or those obtained in such circumstances that the exclusion of "friends, advisers, or counselors" made it highly likely that force was used, *Chambers* v. *Florida*, 309 U.S. 227, 238, 60 Sup. Ct. 472, 84 L. Ed. 716 (1940).

The right to counsel remained in some suspense during the period governed by *Betts* v. *Brady*, 316 U.S. 455, 62 Sup. Ct. 1252, 86 L. Ed. 1595 (1942), but during the years following *Betts*, the views were rapidly developed by just short of a majority of this Court that secret confessions obtained without counsel between arrest and arraignment were invalid; *Haley* v. *Ohio*, 332 U.S. 596, 68 Sup. Ct. 302, 92 L. Ed. 224 (1948); *In re Groban's Petition*, 352 U.S. 330, 77 Sup. Ct. 510, 1 L. Ed. 2d 376 (1957). This view had the support of four Justices of the present Court in *Crooker* v. *California*, 357 U.S. 433, 78 Sup. Ct. 1287, 2 L. Ed. 2d 1448 (1958); *Cicenia* v. *La Gay*, 357 U.S. 504, 78 Sup. Ct. 1297, 2 L. Ed. 2d 1523 (1958).

When the right to counsel was recognized at the arraignment period, *Hamilton* v. *Alabama*, 368 U.S. 52, 82 Sup. Ct. 157, 7 L. Ed. 2d 114 (1961), and for all crimes at trial, *Gideon* v. *Wainwright*, 372 U.S. 335, 83 Sup. Ct. 792, 9 L. Ed. 2d 799 (1963), and when it was recognized that the privilege against self-incrimination applied to the states as well as the federal government, *Malloy* v. *Hogan*, 378 U.S. 1, 84 Sup. Ct. 1489, 12 L. Ed. 2d 653 (1964), any view that counsel was not required for interrogation became untenable. Hence counsel was required for interrogation at least where requested in *Escobedo* v. *Illinois*, 378 U.S. 478, 84 Sup. Ct. 1758, 12 L. Ed. 2d 977 (1964); and the fact that a request

happens to have been made at that particular case cannot be controlling for *Carnley* v. *Cochran*, 369 U.S. 506, 82 Sup. Ct. 884, 8 L. Ed. 2d 70 (1962) held that the right to be furnished counsel does not depend upon a request.

We therefore urge upon the Court that line of cases interpreting *Escobedo* which holds that there is a right to counsel during the interrogation period for any person under arrest; *People* v. *Dorado*, 42 Cal. Rptr. 169, 398 P. 2d 361 (1965); *Wright* v. *Dickson*, 336 F. 2d 878 (9th Cir. 1964); *United States ex rel. Russo* v. *New Jersey*, 351 F. 2d 429 (3d Cir. 1965); *Collins* v. *Beto*, 348 F. 2d 823 (5th Cir. 1965); *Commonwealth* v. *Negri*, 213 A. 2d 670 (Pa. 1965).

We deal with the basic principle, the principle expressed by Justice Douglas in his concurring opinion in *Culombe* v. *Connecticut*, 367 U.S. 568, 637, 81 Sup. Ct. 1860, 6 L. Ed. 2d 1037 (1961), that "any accused—whether rich or poor—has the right to consult a lawyer before talking with the police."

This constitutional principle is not incompatible with proper law enforcement. It will have no effect on organized crime, whose members know the method of combat with society all too well; the principle here advocated as a practical matter of solid experience applies primarily to the poor, the ignorant, and frequently, those of limited mental ability. The right to counsel under public defender systems may well be costly, but the dollar cost of preservation of a constitutional right is no reason for ignoring that right.

The larger problem is whether extending the right to counsel into the interrogation period will unduly handicap the police in their work. Numerous reports of actual experience are analyzed in the brief to show that this hazard need not be heavily weighed. Concrete experiences for vari-

ous cities are reported including the observation of Judge George Edwards of the United States Court of Appeals for the Sixth Circuit who had been Detroit's police commissioner in 1962 and 1963. Judge Edwards attempted to apply "Supreme Court standards." He found no ill effects and much benefit. A review of actual experience shows that third degree abuses are not some remote fantasy; they happen now, and so does wrongful detention without charge and without counsel. These things occur in great numbers in today's United States. They are practices which, as the scrupulously meticulous Horsky Report for the District of Columbia concludes, "arrest for investigation should cease immediately."

At best, as a practical matter, confessions obtained from ignorant persons without counsel are the product of skilled leading by trained prosecutors or investigators. See the opinion of Judge Smith in *United States* v. *Richmond,* 197 F. Supp. 125 (D. Conn. 1960). Even without physical abuse, confessions are obtained by means wholly unworthy of free people. The evil of the "led confession" is particularly apparent in the instant case in which the defendant was clearly led into assertions which only dubiously originated with him, and without which would have led to his conviction for a grave but lesser offense.

When this defendant went into Interrogation Room 2, instead of having "the guiding hand of counsel" to which we believe the principles of *Powell* v. *Alabama* entitled him, he had the guiding hand of two policemen. When he came out of Interrogation Room 2, there was no longer any point in giving him counsel—his case was over. We believe that such practices are barred by the Sixth and Fourteenth Amendments to the Constitution of the United States.

Argument

When Miranda walked out of Interrogation Room 2 on March 13, 1963, his life for all practical purposes was over. Whatever happened later was inevitable; the die had been cast in that room at that time. There was no duress, no brutality. Yet when Miranda finished his conversation with Officers Cooley and Young, only the ceremonies of the law remained; in any realistic sense, his case was done. We have here the clearest possible example of Justice Douglas' observation, "what takes place in the secret confines of the police station may be more critical than what takes place at the trial." *Crooker* v. *California*, 357 U.S. 433, 444-45, 78 Sup. Ct. 1287, 2 L. Ed. 2d 1448 (1958) (dissenting opinion).

The question presented is whether a defendant in such circumstances is entitled to be told of his right to counsel and to have a meaningful opportunity to consult counsel before the law disposes of him. For "what use is a defendant's right to effective counsel at every stage of a criminal case if, while he is held awaiting trial, he can be questioned in the absence of counsel until he confesses?" Justices Douglas, Black, and Brennan in *Spano* v. *New York*, 360 U.S. 315, 326, 79 Sup. Ct. 1202, 3 L. Ed. 2d 1265 (1959).

I.

There Is a Right to Counsel for Arrested Persons When Interrogated by the Police.

We deal here with growing law, and look to where we are going by considering where we have been. The existence of a right to counsel of any sort at any time did not exist in medieval England; Plucknett tells us that not until the 15th Century was counsel allowed to argue points of law; that in 1695 counsel was allowed in treason trials; and that not until 1836 was counsel allowed in felony cases.[4]

While English statutes did not provide for counsel in felony cases before 1836, in practice counsel did participate in English criminal trials before the American Revolution.[5] This is of consequence in understanding early American constitutional and statutory provisions of substantially the same vintage as the Bill of Rights. Many of these expressly or in practice asserted a right to counsel (New Hampshire, Vermont, Massachusetts, Rhode Island, New York, Maryland, North Carolina, Georgia), and some of them even at that early time required that appointed counsel be made available (Connecticut, New York (*dubitante*), Pennsylvania, New Jersey, Delaware, and South Carolina).[6] Speaking broadly, therefore, the Sixth Amendment was in general accord with the English and American practice of its time: "In all criminal prosecutions, the accused shall

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[4] Plucknett, *A Concise History of the Common Law*, 385-86 (2d ed. 1936), citing for the 1837 development to 6 & 7 Will. IV, c. 114.

[5] Comment, *An Historical Argument* [*etc.*], 73 Yale L.J. 1000, 1027-28 (1964); and see historical analysis in *Powell* v. *Alabama*, 287 U.S. 45, 53 Sup. Ct. 55, 77 L. Ed. 158 (1932).

[6] *Id.*, appendix, 73 Yale L.J. at 1055-57.

enjoy the right . . . to have the assistance of counsel for his defence."

Sixth Amendment problems came to the Court surprisingly late, both as to federal and state procedure.

A. Federal Experience.

The leading case is *Johnson* v. *Zerbst,* 304 U.S. 458, 58 Sup. Ct. 1019, 82 L. Ed. 1461 (1938). In that case, petitioner, without counsel, had been convicted of counterfeiting. There was a conflict as to whether or not he had asked for counsel. The decision decisively establishes as an "obvious truth that the average defendant does not have the professional legal skill to protect himself when brought before a tribunal with power to take his life or liberty. . . . " 304 U.S. at 462-63. The opinion, quoting from *Powell* v. *Alabama,* 287 U.S. 45, 68, 69, 53 Sup. Ct. 55, 77 L. Ed. 158 (1932), repeats that a defendant " 'requires the guiding hand of counsel at every step in the proceedings against him.' " 304 U.S. at 463. Hence in *Johnson* v. *Zerbst,* the Court declared that "the Sixth Amendment withholds from Federal Court, in all criminal proceedings, the power and authority to deprive an accused of his life and liberty unless he has or waives the assistance of counsel." *Ibid.*[1]

The Court further declared that "since the Sixth Amendment constitutionally entitled one charged with crime to the assistance of counsel, compliance with this constitutional mandate is an essential judicial prerequisite to a federal court's authority to deprive an accused of his life or liberty." *Id.* at 467.

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[1] The case also considered the subject of waiver, a matter we do not develop here because there is no waiver question in the *Miranda* case, there being no suggestion that the defendant had the faintest notion of any right to counsel.

The requirements of *Johnson* v. *Zerbst* were carried into effect by Rules 5 and 44 of the Rules of Criminal Procedure. Rule 5 expressly provides that any arrested person should be taken "without unnecessary delay before the nearest available commissioner" who is to tell the accused both of his right to stand silent and of his right to counsel. Rule 44 confirmed this provision by providing for appointment of counsel if need be. But it should always be remembered that these rules were simply manifestations of the Sixth Amendment as declared in *Johnson* v. *Zerbst.*

Rule 5 with its provision for arraignment "without unnecessary delay" became the battleground for the immediate issue now before the Court. If the defendant is brought before the commissioner instantly, he cannot be interrogated before being informed of his right to counsel. On the other hand, if the period pending presentment is protracted, the right to counsel can, as in the instant case, be made meaningless because the defendant may be in such a position before the arraignment that a combination of Clarence Darrow and John W. Davis reincarnated could do him no good. In *McNabb* v. *United States,* 318 U.S. 332, 63 Sup. Ct. 608, 87 L. Ed. 219 (1943), the issue was whether a confession should be excluded which was obtained in the course of an extended interrogation. The defendants "had no lawyer. There is no evidence that they requested the assistance of counsel, or that they were told that they were entitled to such assistance." 318 U.S. at 335. This Court, taking up the matter from the standpoint of "civilized standards" of justice, *id.* at 340, found that the procedure followed "tends to undermine the integrity of the criminal proceeding." *Id.* at 342. The Court, analyzing the proper division of functions in criminal law enforcement, declared that proper procedure "aims to avoid all the evil implica-

tions of secret interrogation of persons accused of crimes." *Id.* at 344.

McNabb scrupulously avoids constitutional interpretation, restricting itself to a matter of proper federal practice. The *McNabb* rule was not applied in *United States* v. *Mitchell,* 322 U.S. 65, 64 Sup. Ct. 896, 88 L. Ed. 1140 (1944) where the confession was held to be so immediate that it was construed to be spontaneous. However, the rule was applied again in *Upshaw* v. *United States,* 335 U.S. 410, 69 Sup. Ct. 170, 93 L. Ed. 100 (1948), a case in which the defendant confessed during a thirty-hour detention. The Court in *Upshaw* stressed that the object of the *McNabb* rule and of Rule 5 was to "check resort by officers to 'secret interrogation of persons accused of crime.'" 335 U.S. at 412. The matter of obtaining counsel was considered by the dissent, which observed that the practical effect of speedy application of the rule was that "prompt hearing gives an accused an opportunity to obtain a lawyer," with all of the consequences of giving legal advice to "the illiterate and inexperienced." 335 U.S. at 424.

The matter was again reviewed in *Mallory* v. *United States,* 354 U.S. 449, 77 Sup. Ct. 1356, 1 L. Ed. 2d 1479 (1957). In *Mallory,* the defendant, like the defendant here, was charged with rape. He was interrogated for about ten hours after his arrest, the inquiry going deep into the night, at the end of which he made a confession. The next morning he was brought before a commissioner. The Court noted that the Criminal Rules were adopted "since such unwarranted detention led to tempting utilization of intensive interrogation, easily gliding into the evils of 'the third degree;'" and that therefore the police could detain a person only until "a committing magistrate was readily accessible." 354 U.S. at 453.

The Court held that the time interval permitted between arrest and presentation to a magistrate was intended to give "little more leeway than the interval between arrest and the ordinary administrative steps required to bring a suspect before the nearest available magistrate." It added that a person was to be arraigned "as quickly as possible so that he may be advised of his rights . . . But he is not to be taken to police headquarters in order to carry out a process of inquiry that lends itself, even if not so designed, to eliciting damaging statements to support the arrest and ultimately his guilt." *Id.* at 453-54. The Court noted that the defendant had not been "told of his rights to counsel or to a preliminary examination before a magistrate, nor was he warned that he might keep silent . . . " *Id.* at 455. The opinion concluded "it is not the function of the police to arrest, as it were, at large and to use an interrogating process at police headquarters in order to determine whom they should charge before a committing magistrate on 'probable cause.'" *Id.* at 456.

Mallory was the unanimous expression of this Court. Once again the case did not formally involve a constitutional issue, but rather the interpretation of the rules of criminal procedure. Unlike its predecessor, the opinion did not refer to constitutional standards. Nonetheless, *Mallory*, by its express recognition of the legitimate need for counsel during the interrogation, went far to establish for the federal system the principle here advocated.

B. The Constitutional Principles Applied to State Criminal Proceedings; the Development to Escobedo.

The development of constitutional doctrine as applied to state proceedings can be grouped around three key decisions, *Powell* v. *Alabama*, 287 U.S. 45, 53 Sup. Ct. 55, 77

L. Ed. 158 (1932); *Betts* v. *Brady*, 316 U.S. 455, 62 Sup. Ct. 1252, 86 L. Ed. 1595 (1942); and *Gideon* v. *Wainwright*, 372 U.S. 335, 83 Sup. Ct. 792, 9 L. Ed. 2d 799 (1963).

(a) *The Powell period (1932-1942).*

Powell is too familiar to warrant restatement. In this famous rape case, counsel was appointed but exercised only a nominal function, permitting defendants to be hustled to trial. The function of counsel was described as "pro forma." The Court held that:

> "defendants were not accorded the right of counsel in any substantial sense. To decide otherwise would simply be to ignore actualities. . . . The prompt disposition of criminal cases is to be commended and encouraged. But in reaching that result the defendant, charged with a serious crime, must not be stripped of his right to have sufficient time to advise with counsel and prepare his defense." 287 U.S. at 58-59.

This Court in *Powell* recognized that the right to counsel was a growing, not a static, constitutional right. It refused to be guided by the standards of England at the time the Constitution was adopted, following instead the more liberal practice of the various colonies. The right to counsel was held to be one of those " 'fundamental principles of liberty and justice which lie at the base of all our civil and political institutions,' " *id.* U.S. at 67, quoting *Hebert* v. *Louisiana*, 272 U.S. 312, 316, 47 Sup. Ct. 103, 71 L. Ed. 270 (1926); it was expressly held to be an integral part of the right to a fair hearing. This led Justice Sutherland to the classic passage: the person charged with the crime "requires the guiding hand of counsel at every step in the proceedings

against him." This said the Court, was true for men of intelligence and even more true for "the ignorant and illiterate, or those of feeble intellect." 287 U.S. at 69. The trial court therefore must first give the defendant the right to employ counsel, and second, if need be, must appoint counsel. The Court made no decision as to non-capital cases, but as to capital cases it held that:

> "where the defendant was unable to employ counsel, and is incapable adequately of making his own defense because of ignorance, feeble-mindedness, illiteracy, or the like, it is the duty of the court, whether requested or not, to assign counsel for him as a necessary requisite of due process of law; and that duty is not discharged by an assignment at such a time or under such circumstances as to preclude the giving of effective aid in the preparation and trial of the case."

Miranda strikingly parallels the *Scottsboro* case; here, as there, the defendant did not have counsel "at such times or under such circumstances as to preclude the giving of effective aid in the preparation and trial of the case."

Immediately after *Powell*, the right to counsel cases began to relate directly to the forced confession cases; as this Court said in *Mallory, supra*, secret interrogation, which is interrogation without counsel, tends to slide into the third degree. Thus in *Brown* v. *Mississippi*, 297 U.S. 278, 56 Sup. Ct. 461, 80 L. Ed. 682 (1936), the leading confession by torture case, the Court mentioned *Powell* as illustrative of the principles of basic justice, observing that "the state may not deny to the accused the aid of counsel." In *Brown*, trial counsel failed to make proper objections to confessions obtained by violent beating. In *Chambers* v. *Florida*,

309 U.S. 227, 60 Sup. Ct. 472. 84 L. Ed. 716 (1940), a long additional step was taken. In *Brown,* it was indisputable that physical violence had been applied to the defendants. In *Chambers* there was a factual dispute as to whether or not there had been physical compulsion. This Court nonetheless held that the protracted questioning, in all of the circumstances, banned the confession under the Fourteenth Amendment, noting that the defendants had been held and interrogated "without friends, advisers, or counselors." 309 U.S. at 238.

The state of the law as it stood in relation to right to counsel and confessions in 1940 may fairly be summarized as follows:

In the federal courts there was an absolute right to counsel in criminal cases. In the state courts there was an absolute right to counsel, and appointed counsel at that, at least in capital cases, the matter being reserved as to non-capital cases. A confession obtained by force could not be used, and a confession obtained by protracted interrogation where there was an unresolved dispute as to force, and where the defendant had been interrogated, among other things, "without counselors" denied due process. There was, however, an ambiguity left open by the *Powell* case. The Court had declared in *Powell* that a person charged with a crime "requires the guiding hand of counsel at every step in the proceedings against him;" but there had not yet been resolved the question of whether "every step in the proceedings" really meant "every step in the proceedings," which would include interrogation, or whether, despite the broad sweep in the language, something less was intended.[8]

[8] This summary does not take account of *Lisenba* v. *California,* 314 U.S. 219, 62 Sup. Ct. 280, 86 L. Ed. 166 (1941). *Lisenba* in-

(b) *The Betts period (1942-1963).*

Betts, like *Powell,* is too familiar to need restatement. The case held, in its chief conclusions, that while counsel was required in capital cases and in some undefined other cases, it was not required in all cases. But on the way to reaching that decision, *Betts* also decided one other point of great importance in the instant case. It expressly recognized that under the Sixth Amendment as interpreted in *Johnson* v. *Zerbst, supra,* appointed counsel was required "in all cases where a defendant is unable to procure the services of an attorney." 316 U.S. at 464. It thereupon examined the question of whether Sixth Amendment principles should in fact be imported into the interpretation of the Fourteenth Amendment. This vital question is answered in the negative, thus laying the foundation for the particular conclusion *Betts* reached. Justices Black, Douglas and Murphy dissenting did so expressly on the ground that the Sixth Amendment is applicable to state criminal proceedings, the view adopted twenty years later in *Gideon.*

During the reign of *Betts,* the confession cases turned on "special circumstances," as is illustrated in the citations

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volved a confession obtained upon protracted interrogation. The majority noted expressly that "counsel had been afforded [the petitioner] and had advised him." Apparently petitioner saw his attorney as much as he wished up to the critical day of his interrogation and confession. 314 U.S. at 230-31, 240. Hence the majority, in upholding the use of the confession, expressly noted that this was not a case in which he had been interrogated "without the advice of friends or of counsel;" (*id.* at 240) and the Court further observed that if a person held were incommunicado, subject to questioning for a long period, "and deprived of the advice of counsel," (*ibid.*) it would inspect the matter with great care. On the other hand, the dissent shows that the defendant was without counsel on the critical confession day, 314 U.S. at 242. In view of these specialized facts, we put the case aside in considering the immediate problem.

in the concurring opinion of Justice Clark in *Gideon* v. *Wainwright*, 372 U.S. at 347-49. This same specialized notion of the circumstances applied also to the right to counsel as it related to the interrogation. An example is *Haley* v. *Ohio*, 332 U.S. 596, 68 Sup. Ct. 302, 92 L. Ed. 224 (1948). In this case a fifteen year old boy was interrogated for five hours before he confessed to murder. The judgment of the Court reversing the conviction was announced by Justice Douglas, and joining with him in an opinion were Justices Black, Murphy and Rutledge. This opinion particularly stressed that "at no time was this boy advised of his right to counsel." Noting the youth of the defendant, the opinion said:

> "He needs counsel and support if he is not to become the victim first of fear, then of panic. He needs someone on whom to lean lest the overpowering presence of the law, as he knows it, may not crush him. No friend stood at the side of this 15-year old boy as the police, working in relays, questioned him hour after hour, from midnight until dawn. No lawyer stood guard to make sure that the police went so far and no farther, to see to it that they stopped short of the point where he became the victim of coercion. No counsel or friend was called during the critical hours of questioning. A photographer was admitted once this lad broke and confessed. But not even a gesture towards getting a lawyer for him was ever made.
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> "This disregard of the standards of decency is underlined by the fact that he was kept incommunicado for over three days during which the lawyer retained to represent him twice tried to see him and twice was refused admission." 332 U.S. at 600.

It was asserted that the petitioner had signed a confession, and that the signed confession asserted that he knew fully of his rights. Said these four Justices: "That assumes, however, that a boy of fifteen, without aid of counsel, would have a full appreciation of that advice and that on the facts of this record he had a freedom of choice. We cannot indulge those assumptions." *Id.* at 601. The four Justices made clear that they were not announcing a principle simply for boys in custody, but one which applied equally to any defendant: "The Fourteenth Amendment prohibits the police from using the private, secret custody of either man or child as a device for wringing confessions from them." *Ibid.*

We assume that the opinion in *Haley,* had it been of five Justices, would totally control in the instant situation. The interrogation, though at an odd hour, was relatively brief, and the opinion, emphasizing the necessity of counsel, tells us that the same principles apply to adults. But there were not five. Justice Frankfurter concurred specially, also noting the interrogation without counsel carries temptations for abuse. *Id.* at 605. He concluded that the confession should be barred because of specialized circumstances in the particular case, without reaching the broader question. The dissenting Justices were apparently content that the boy had not asked for counsel before his arraignment.

In 1957, two new voices were added in this Court on the right to counsel at the interrogation state. The case was *In re Groban's Petition,* 352 U.S. 330, 77 Sup. Ct. 510, 1 L. Ed. 2d 376 (1957), in which the issue was the validity of an inquiry by the Ohio State Fire Marshal into the cause of a fire, the inquiry involving compulsory testimony

without presence of counsel. The majority opinion, by Justice Reed on his last day on the Court, found distinctions because this was an administrative hearing and therefore did not reach the principal question. Justice Black, for Chief Justice Warren and Justices Douglas and Brennan, did. What was said by those four Justices there synthesizes everything we have to say in the instant case (352 U.S. at 340-44). At any secret hearing,

1. "The witness has no effective way to challenge his interrogator's testimony as to what was said and done at the secret inquisition. The officer's version frequently may reflect an inaccurate understanding of an accused's statements or, on occasion, may be deliberately distorted or falsified. While the accused may protest against these misrepresentations, his protestations will normally be in vain. . . ."

This hazard is diminished by having the public or suspect's counsel present.

2. "Behind closed doors he [the defendant] can be coerced, tricked or confused by officers into making statements which may be untrue or may hide the truth by creating misleading impressions. While the witness is in the custody of the interrogators, as a practical matter, he is subject to their uncontrolled will." *Id.* at 341-42.

3. "Nothing would be better calculated to prevent misuse of official power in dealing with a witness or suspect than the scrutiny of his lawyer or friends or even of disinterested bystanders."

4. "I also firmly believe that the Due Process Clause requires that a person interrogated be allowed to use

legal counsel whenever he is compelled to give testimony to law-enforcement officers which may be instrumental in his prosecution and conviction for a criminal offense. This Court has repeatedly held that an accused in a state criminal prosecution has an unqualified right to make use of counsel at every stage of the proceedings against him."

5. "The right to use counsel at the formal trial is a very hollow thing when, for all practical purposes, the conviction is already assured by pretrial examination."

These same dissenting Justices expressed their views again in *Crooker* v. *California,* 357 U.S. 433, 78 Sup. Ct. 1287, 2 L. Ed. 2d 1448 (1958) and *Cicenia* v. *La Gay,* 357 U.S. 504, 78 Sup. Ct. 1297, 2 L. Ed. 2d 1523 (1958). Crooker confessed during interrogation after he had asked for counsel and it was refused him. The Court, in passing upon the admissibility of the confession, concluded that the sole real issue was whether he had been coerced by the denial of his request for counsel. Citing various cases to the effect that confessions made prior to State appointment of counsel are not thereby rendered involuntary, the Court upheld the conviction. Applying the special circumstances test, it concluded that the particular petitioner was able to take care of himself without counsel at that stage. The Court held that State refusal of a request to engage counsel was a denial of constitutional rights "if he is deprived of counsel for any part of the pretrial proceedings, provided that he is so prejudiced thereby as to infect his subsequent trial with an absence" of fundamental fairness. 357 U.S. at 439. This, it was held, depended on the circumstances of the case. The Court rejected the view, as having a "devastating effect on enforcement of criminal law," that police question-

ing, fair as well as unfair, should be precluded until the accused is given an opportunity to call his attorney. *Id.* at 440.

Justice Douglas, for Chief Justice Warren and Justices Black and Brennan, gave an emphatic and detailed analysis of the absolute need for counsel at the pretrial stage, first to avoid the third degree, second because of the impossibility of determining disputes over what actually happened in the secret chamber, and finally, because of the importance of pretrial period. These Justices adopted the view that " 'the pre-trial period is so full of hazards for the accused that, if unaided by competent legal advice, he may lose any legitimate defense he may have long before he is arraigned and put on trial.' " *Id.* at 445-46. They also adopted the statement of Professor Chafee, "A person accused of crime needs a lawyer right after his arrest probably more than at any other time." *Id.* at 446. Adopting the views of *Powell* v. *Alabama* and the views of the dissent of *In re Groban's Petition*, both *supra*, this opinion concluded that "The demands of our civilization expressed in the Due Process Clause require that the accused who wants a counsel should have one at any time after the moment of arrest." *Id.* at 448.

Cicenia involved similar issues. The defendant, before his indictment, was interrogated at the police station. He wanted counsel then and his family wanted to provide it, but the police did not permit the petitioner to meet with his lawyer or his family until after they had the confession. A majority rejected the view "that any state denial of a defendant's request to confer with counsel during police questioning violates due process, irrespective of the particular circumstances involved." 357 U.S. at 509. The same

dissenters as in *Crooker* (except Justice Brennan, not participating) disagreed; they believed that *Cicenia* was "the occasion to bring our decision into tune with the constitutional requirement for fair criminal proceedings against the citizen." *Id.* at 512.[9]

Soon after *Crooker* and *Cicenia*, the tide which was to overrule *Betts* began to flow with new vigor. In *McNeal* v. *Culver*, 365 U.S. 109, 81 Sup. Ct. 413, 5 L. Ed. 2d 445 (1961), Justices Douglas and Brennan called outright for the overruling of *Betts*. In *Culombe* v. *Connecticut*, 367 U.S. 568, 81 Sup. Ct. 1860, 6 L. Ed. 2d 1037 (1961), Justices Frankfurter and Stewart, applying the particular circumstances approach, held that a confession should not be admitted. Those Justices pointedly rejected the view that all persons under interrogation should be entitled to counsel. Observing that "Legal counsel for the suspect will generally prove a thorough obstruction to the investigation," 367 U.S. at

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[9] Another case of this special circumstances type is *Reck* v. *Pate*, 367 U.S. 433, 81 Sup. Ct. 1541, 6 L. Ed. 2d 948 (1961). Justice Douglas concurring said, "I would hold that any confession obtained by the police while the defendant is under detention is inadmissible unless there is prompt arraignment and unless the accused is informed of his right to silence and accorded an opportunity to consult counsel." 367 U.S. at 448. See also *Spano* v. *New York*, 360 U.S. 315, 79 Sup. Ct. 1202, 3 L. Ed. 2d 1265 (1959), in which the defendant had been indicted and thereafter confessed without counsel. Chief Justice Warren for the Court said that the "abhorrence of society to the use of involuntary confessions" among other things "turns on the deep rooted feeling that the police must obey the law while enforcing the law; that in the end life and liberty can be as much endangered from illegal methods used to convict those thought to be criminals as from the actual criminals themselves." 360 U.S. at 320-21, footnote 2 on 321 summarizing the confession cases from *Brown* to this point. Justices Douglas, Black and Brennan, concurring, held that after indictment certainly the Government can never interrogate the accused in secret when he has asked for his lawyer. Justice Stewart, concurring, rested heavily on the fact that this defendant was under indictment.

580, their opinion reviewed the practice of other countries and again observed that the *McNabb* principles had not been applied to state cases. Justices Douglas and Black wished to rest frankly on the principle "that any accused —whether rich or poor—has the right to consult a lawyer before talking with the police; and if he makes the request for a lawyer and it is refused," his constitutional rights are violated. *Id.* at 637. While an attorney may tell a defendant of his constitutional right not to testify, these Justices felt that all defendants are entitled to know their constitutional rights.

At the end of the *Betts* period, the condition of the constitutional law on the right to counsel at trial or during interrogation and the meaning of that right was this: a majority of this Court, so far as decisions were concerned, either had participated in *Betts* or had not yet disapproved it. The state of the law therefore was while a person was entitled to counsel of his choice in every case, *Chandler* v. *Fretag,* 348 U.S. 3, 75 Sup. Ct. 1, 99 L. Ed. 4 (1954), he was not yet entitled to appointed counsel at actual trial in every case. He was entitled to counsel in all federal cases; he was entitled to counsel at trial in all state capital cases; and he was entitled to counsel at trial in all other cases dependent upon special circumstances. This right in capital cases extended also to the arraignment, at least where the arraignment was "a critical stage in a criminal proceeding," because "What happens there may affect the whole trial." *Hamilton* v. *Alabama,* 368 U.S. 52, 54, 82 Sup. Ct. 157, 7 L. Ed. 2d 114 (1961). Four Justices of this Court (Chief Justice Warren and Justices Black, Douglas and Brennan) had expressed views indicating a belief that there was a right to counsel at interrogation, but a majority was not ready to go so far.

(c) *The Gideon period (1963-).*

In overruling *Betts,* Justice Black for the Court closed the circle by applying the principle of his own 1938 opinion of *Johnson* v. *Zerbst, supra,* to state proceedings. This Court in *Gideon* thus erased the fundamental distinction between the state and federal cases by holding that the Sixth Amendment guarantee of counsel was of such character that it applied to the states in full. The Court, readopting the conclusive authority of *Powell* v. *Alabama,* declared that "The right of one charged with crime to counsel may not be deemed fundamental and essential to fair trials in some countries, but it is in ours." 372 U.S. at 344. Justice Douglas, concurring, noted that this did not mean that some kind of a watered-down version of the Sixth Amendment was made applicable to the states—its totality applied to both.

It follows that so far as the Sixth Amendment is concerned, after March 18, 1963, there is no difference between the right to counsel as provided in that Amendment in the two court systems. *Gideon* was followed shortly by *Haynes* v. *Washington,* 373 U.S. 503, 83 Sup. Ct. 1336, 10 L. Ed. 2d 513 (1963), holding that the failure to tell a defendant under interrogation that he is entitled to be represented by counsel is one of the factors relevant to determining whether his confession was voluntary, 373 U.S. at 516-17; and by *White* v. *Maryland,* 373 U.S. 59, 83 Sup. Ct. 1050, 10 L. Ed. 2d 193 (1963), which further extended the rule of *Hamilton* v. *Alabama.* In *White,* at a preliminary hearing, defendant pled guilty without counsel. Thereafter he was always afforded counsel. This Court held in effect that any stage at which a person can plead guilty is "critical" and he is entitled to counsel then.

C. Escobedo and the Present Day.

The welter of cases obscures the simple lines of the situation. As of the spring of 1963, this law applied to these situations:

1. Defendants were entitled to counsel at all trials in the federal courts under *Johnson* v. *Zerbst, supra.*

2. Defendants in state courts were entitled to counsel in all trials, *Gideon* v. *Wainwright, supra.*

3. Persons were entitled to counsel in all federal arraignments (Rule 5 of the Rules of Criminal Procedure, as repeatedly interpreted), and in all arraignments or analogous proceedings under state law at which anything of consequence can happen; *Hamilton* v. *Alabama, supra;* and *White* v. *Maryland, supra.*

4. Several Justices believed that in all cases, a person who requested counsel at pre-arraignment investigation was entitled to it, at least in cases in which he wanted to consult his own lawyer; but this was not yet a majority view, *Crooker* v. *California, supra,* and *Cicenia* v. *La Gay, supra.*

5. Several Justices believed that, requested or not, a person has a right to counsel upon interrogation unless he intelligently waived that right. See for the views of Chief Justice Warren and Justices Black, Douglas, and Brennan, variously the *Groban, Crooker,* and *Cicenia* cases, *supra.*

Situation 5 is that presented in the instant case. *Escobedo* v. *Illinois,* 378 U.S. 478, 84 Sup. Ct. 1758, 12 L. Ed. 2d 977 (1964) settled point 4. In *Escobedo,* the defendant, after arrest but before indictment, repeatedly asked to see his counsel and was effectively barred from doing so by the

police. The Court held that it was immaterial whether the defendant had yet been indicted—"It would exalt form over substance to make the right to counsel, under these circumstances, depend on whether at the time of the interrogation, the authorities had secured a formal indictment." *Id.* at 486. The Court, following the New York rule in *People* v. *Donovan*, 13 N.Y. 2d 148, 243 N.Y.S. 2d 841, 193 N.E. 2d 628 (1963) held that a confession even prior to indictment after an attorney had been requested and denied access to see the person, could not be used in a criminal trial.[10] Following the dissenting opinion of *In re Groban, supra*, the Court held that it would make a mockery of the right to counsel if a person were entitled to counsel at trial but not at an earlier stage which in truth disposed of the case. *Cicenia* and *Crooker*, after some attempt to distinguish them, were put aside with the observation that insofar as they might "be inconsistent with the principles announced today, they are not to be regarded as controlling." *Id.* at 492. In summary, *Escobedo* held: "We hold only that when the process shifts from investigatory to accusatory—when its focus is on the accused and its purpose is to elicit a confession—our adversary system begins to operate, and, under the circumstances here, the accused must be permitted to consult with his lawyer." *Ibid.*[11]

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[10] This had special importance because of *Malloy* v. *Hogan*, 378 U.S. 1, 84 Sup. Ct. 1489, 12 L. Ed. 2d 653 (1964), holding that the states cannot, any more than the federal government, abridge the privilege against self-incrimination. Since a principal function of counsel is to advise a defendant of his constitutional rights, including specifically the right against self-incrimination, and since the most significant point of this abridgment is at the interrogation stage, *Malloy* buttressed the necessity of the right to counsel at this point.

[11] *Escobedo* further developed *Massiah* v. *United States*, 377 U.S. 201, 84 Sup. Ct. 1199, 12 L. Ed. 2d 246 (1964) an opinion by

We cannot in candor assert that *Escobedo* unequivocally establishes a right to counsel at the interrogation stage in all situations. Certainly, the three dissenting Justices so construed it, *Id.* at 496-97. On the other hand, any case may depend on its facts. In *Escobedo,* without doubt, the defendant did ask for counsel at the interrogation stage, this was denied him, and the Court did mention this as one of the factual elements in its decision. For an expression of honest puzzlement as to the scope of *Escobedo,* see *Miller* v. *Warden, Maryland Penitentiary,* 338 F. 2d 201, 204 (4th Cir. 1964).

Shortly before *Escobedo,* Justice Douglas, in discussing the need for counsel at the interrogation stage, said that "the federal law here is still halting or yet unborn." Douglas, *The Right to Counsel,* 45 Minn. L. Rev. 693-94 (1961). The new birth which Justice Douglas anticipated in 1961 has led to a nationwide series of conflicting decisions of which the instant case and *People* v. *Dorado,* 42 Cal. Rptr. 169, 398 P. 2d 361 (1965), are typical. The Arizona Supreme Court in the instant case focused upon the fact that in *Escobedo,* the defendant asked for counsel whereas in the instant case, he did not, and therefore reached opposite

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Justice Stewart in which the defendant was induced to make statements, without counsel present, after his indictment. The Court adopted the rule that any "secret interrogation" after the indictment without the protection of counsel vitiated any confession so obtained. Three dissenting judges in *Massiah* thought that the reasoning of the case should apply equally to "statements obtained at any time after the right to counsel attaches, whether there has been an indictment or not," 377 U.S. at 208; and in *Escobedo,* the majority took the view that no meaningful distinction can be drawn between interrogation of an accused before indictment or after. However, in *Escobedo* Justice Stewart expressed his own view that the fact of indictment "makes all the difference." 378 U.S. at 493.

results dependent upon that request. Chief Justice Traynor had already, before *Escobedo,* led the way toward a right to counsel at the interrogation stage in *People* v. *Garner,* 57 Cal. 2d 135, 18 Cal. Rptr. 40, 367 P. 2d 680, 693 (1961) (concurring). This landmark analysis put aside any distinction between a right to counsel after as distinguished from before indictment.[12]

The only difference between *Escobedo* and *Dorado* was that Dorado had neither retained nor requested counsel. The California court concluded that whether or not the accused had requested counsel was "a formalistic distinction." It read *Escobedo* to mean that defendant's right to counsel did mature at the accusatory stage; "the stage when legal aid and advice were most critical" to defendant; therefore California held that his vocalization of that right cannot be the determinative factor. 42 Cal. Rptr. at 175, with comprehensive citations following. Hence, California concluded that "the right to counsel matures at this critical accusatory stage; the right does not originate in the accused's assertion of it." *Id.* at 176.

Indeed, there are numerous decisions of this Court holding that the right to counsel, where it indisputably exists, does not depend upon a request for it; see for example,

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[12] "It is a formalistic assumption that indictment is the point when a defendant particularly needs the advice and protection of counsel. Often a defendant is arrested under highly suspicious circumstances and from the time he is apprehended his guilt is a foregone conclusion in the minds of the police. Frequently too, suspicion falls upon him at some intermediate point before indictment. In some cases the evidence against the accused may be stronger at the moment of arrest than it may be in other cases when the indictment is returned. It is hardly realistic to assume that a defendant is less in need of counsel an hour before indictment than he is an hour after." 367 P. 2d at 695.

Carnley v. *Cochran,* 369 U.S. 506, 82 Sup. Ct. 884, 8 L. Ed. 2d 70 (1962), holding with numerous citations that "it is settled that where the assistance of counsel is a constitutional requisite, the right to be furnished counsel does not depend on a request." 369 U.S. at 513; and see, for post-*Gideon* application of this rule, *Doughty* v. *Maxwell,* 376 U.S. 202, 84 Sup. Ct. 702, 11 L. Ed. 2d 650 (1964). Relying on the *Carnley* opinion, the California court concluded that the presence or absence of the request was immaterial, a conclusion reached also because "we must recognize that the imposition of the requirement for the request would discriminate against the defendant who does not know his rights. The defendant who does not ask for counsel is the very defendant who most needs counsel. We cannot penalize the defendant who, not understanding his constitutional rights, does not make the formal request and by such failure demonstrates his helplessness. To require the request would be to favor the defendant whose sophistication or status had fortuitously prompted him to make it." 42 Cal. Rptr. at 177-78. Hence, it held that at the interrogation stage a defendant must be informed of his rights so that he can intelligently waive them.

As noted, the cases have divided. *Wright* v. *Dickson,* 336 F. 2d 878, 882 (9th Cir. 1964) expressly holds that under *Escobedo,* the test is whether "the investigation was then no longer a general inquiry but had focused on appellant," and it is immaterial whether or not "appellant asked to consult retained counsel or to be provided with the assistance of appointed counsel, nor, indeed, whether he requested counsel at all, except as the latter fact might bear upon waiver." See to the same effect, *United States ex rel. Russo*

v. *New Jersey*, 351 F. 2d 429, 438 (3d Cir. 1965);[13] and see the opinion of Tuttle, *J.*, in *Collins* v. *Beto*, 348 F. 2d 823, 830-31 (5th Cir. 1965), with abundant citations. See also, as an example of a state reversing itself to accord with this position, *Commonwealth* v. *Negri*, 213 A. 2d 670 (Pa. 1965).

Yet not only the instant case, but numerous others go the other way. See for example, *People* v. *Gunner*, 15 N.Y. 2d 226, 205 N.E. 2d 852 (1965), although Chief Judge Desmond and Judge Fuld disagree with that conclusion; see 205 N.E. 2d at 855-56. See also as illustrations of cases limiting *Escobedo* to its facts, *Latham* v. *Crouse*, 338 F. 2d 658 (10th Cir. 1964); *Jackson* v. *United States*, 337 F. 2d 136 (D. C. Cir. 1964); *United States* v. *Ogilvie*, 334 F. 2d 837 (7th Cir. 1964); *Mefford* v. *States*, 235 Md. 497, 201 A. 2d 824 (1964).[14]

D. The Right to Counsel at Interrogation: 1966.

The issue is whether, under the Sixth Amendment to the Federal Constitution as made applicable to the states by the Fourteenth, there is the same right to counsel at interrogation of an arrested suspect as there is at arraignment (*Hamilton* v. *Alabama, supra; People* v. *White, supra*) or

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[13] "No sound reasoning that we can discover will support the conclusion that although at other stages in the proceedings in which the right attaches there must be an intelligent waiver, at the interrogation level a failure to request counsel may be deemed to be a waiver."

[14] For other cases to the same effect, see Note, *The Right to Counsel During Police Interrogation*, 25 Md. L. Rev. 165, 172, n. 58 (1965); and see Dowling, *Escobedo and Beyond*, 56 J. Crim. Law 143, 155, notes 81 and 82 (1965). Outstandingly useful articles relating to the problems of this case are Comments at 53 Calif. L. Rev. 337 (1965); 52 Geo. L.J. 825 (1964); 25 Md. L. Rev. 165 (1965); and 32 U. Chi. L. Rev. 560 (1965).

at trial (*Johnson* v. *Zerbst, supra; Gideon* v. *Wainwright, supra*).

The right does exist. It is the same. This is not the result of a single case, *Escobedo* or any other. Rather, there is a tide in the affairs of men, and it is this engulfing tide which is washing away the secret interrogation of the unprotected accused. The *McNabb-Mallory* line of cases may in terms be restricted to the rules, but the rules themselves are a reflection of the Sixth Amendment as interpreted in *Johnson* v. *Zerbst, supra.* Once the Sixth Amendment is clearly applicable to the states (*Gideon* v. *Wainwright*), then the constitutional standards are the same. *Escobedo,* although all that was involved there was a fact situation in which a request had been made and denied, necessarily transcends its facts because it recognizes the interrogation as one of the sequence of proceedings covered by the Sixth Amendment. Since *Carnley* v. *Cochran, supra,* bars unwitting waiver under the Sixth Amendment, it necessarily applies to the totality of that to which the Sixth Amendment applies, and this must necessarily run, as it does, from the interrogation after arrest through the appeal.[15]

We have in this galaxy of cases not a series of isolated phenomena, but reflections of basic belief, beliefs which were expressed in the dissents in *In re Groban; Crooker;* and *Cicenia;* in *Gideon;* in *Malloy* v. *Hogan, supra,* extending the freedom from self-incrimination to the states; and in *Escobedo.* These are all different manifestations of the view expressed by Justice Douglas in *Culombe* v. *Connect-*

[15] For able development of a similar approach and view, see the dissenting opinion of Chief Judge Brune in *Prescoe* v. *State,* 231 Md. 486, 191 A. 2d 226, 232 (1963). We have not considered any of the problems of waiver or any of the problems of pre-arrest interrogation in this case since they are not here.

icut, supra, concurring, where he said, the "principle is that any accused—whether rich or poor—has the right to consult a lawyer before talking with the police."

This case is not to be decided by the color-matching technique of determining whether one case looks just like another case. We deal with fundamentals of liberty, and so, in consequence, with basic belief. The suggestion that the defendant must ask for counsel is to make a great matter depend upon a formal distinction. We warmly commend to this Court *Oregon* v. *Neely,* 239 Ore. 487, 398 P. 2d 482, 486 (1965):

> "Adoption of the distinction advanced by the state would lead to results contrary to the basic beliefs of the United States Supreme Court and of this court. . . . If the state's distinction were accepted, we would grant the assistance of counsel to those educated enough to demand it and deny it to those too ignorant to ask for it. The United States Constitution demands equal treatment during the criminal process for the inexperienced and the uneducated."

II.

Practical Considerations of Law Enforcement Accord With Giving the Sixth Amendment Its Full Meaning.

Whenever rights are recognized for those charged with crime, sincere people will inescapably be concerned as to the effect of those rights on law enforcement. In *Powell* v. *Alabama, supra,* the defendants were tried within a few days of the crime, and in holding that this matter had been hustled too much, this Court found it necessary to discuss

also the problem of the "great and inexcusable delay in the enforcement of our criminal law" as "one of the grave evils of our time." 287 U.S. at 59. In *Chambers* v. *Florida, supra,* the Court observed that "we are not impressed by the argument that law enforcement methods such as those under review are necessary to uphold our laws," 309 U.S. at 240, with a note analyzing the literature in relation to the use of the third degree to obtain confessions. Justice Jackson, in *Watts* v. *Indiana,* 338 U.S. 49, 57, 69 Sup. Ct. 1347, 93 L. Ed. 1801 (1949) made the classic statement of the conflict:

> "To subject one without counsel to questioning which may and is intended to convict him, is a real peril to individual freedom. To bring in a lawyer means a real peril to solution of crime . . . [A]ny lawyer worth his salt will tell the suspect in no uncertain terms to make no such statement to police under any circumstances." [16]

Justice White, dissenting for himself and Justices Clark and Stewart in *Escobedo,* expressed concern for the crippling effect of the decision on law enforcement, 378 U.S. at 499. Justice White, joined by Justices Clark and Harlan, in their dissent in *Massiah, supra,* also developed the matter largely in terms of the effect of the rule on law enforcement, moving from the premise that "a civilized society must maintain its capacity to discover transgressions of the law and to identify those who flout it." 377 U.S. at 207.

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[16] Justice Jackson continued: "If the State may rest on suspicion and interrogate without counsel, there is no denying the fact that it largely negates the benefits of the constitutional guarantee of the right to assistance of counsel. Any lawyer who has ever been called into a case after his client has 'told all' and turned any evidence he has over to the Government knows how helpless he is to protect his client against the facts thus disclosed." 338 U.S. at 59.

With so many members of this Court concerned with the constitutional rule from the practical standpoint of law enforcement, that matter requires independent consideration. The principal practical concerns are two: first, that the system established will be expensive; and second, that it will prevent the detection and punishment of the guilty. At a time when American society is deeply and justly concerned both with rising crime rates and with the menacing existence of organized crime, these are genuinely serious problems.

We begin by observing that the principles here advocated will have exactly zero effect on organized crime. This case involves an important constitutional principle, but it must not be made more important than it is. This case is not a grand caucus on whether sin or virtue should be the order of the day; we are dealing with the precise problem of whether a person charged with crime is to be made effectively aware of his right to counsel at the interrogation stage, and whether he is to be supplied counsel if he needs it at that point. None of this has any application to organized crime at all. The criminal gangs know perfectly well what tools, both physical and legal, they may use in their battle with society. The confession and right to counsel cases which have been before this Court so constantly since *Powell* v. *Alabama* have almost never involved gang-type criminals. The crimes from *Powell* (rape) to *Miranda* (rape) have almost always been rapes and murders, involving defendants poor, poorly educated, and very frequently, as here, of very limited mental abilities. The rich, the wellborn, and the able are adequately protected under existing constitutional standards, and the sophisticates of crime do not need this protection. We are talking here about precisely what was involved in *Chambers* v. *Florida*

twenty-five years ago, the "helpless, weak, outnumbered." 309 U.S. at 241.

A. Cost Factors.

Public defender systems cost money. Many defendants are indigents, and extending the right to counsel into the interrogation stage will increase personnel, paperwork, costs of all kinds. It will make some kind of public defender system virtually obligatory.[17] But the cost increase will by no means be limited to defense costs. As Mr. J. Edgar Hoover observed in 1952, full use of proper scientific methods should make it unnecessary for officers to use dishonorable methods of detection;[18] this inescapably means increased prosecution costs. A laboratory costs more than a strap, and so does the training of those who wield a microscope rather than a whip.

There are undoubtedly cheaper methods of law enforcement than those contemplated by the American Constitution. While some critics have contested the right to counsel in cost terms, no member of this Court has ever attempted to put a price tag on constitutional rights. Pepper in the eyes is cheaper than a fair trial and respect for constitu-

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[17] Pollock, *Equal Justice in Practice,* 45 Minn. L. Rev. 737, 738-39 (1961) estimates 2,000,000 arrests for major offenses in a year, with 1,000,000 needing free legal representation and only 100,000 getting it. Birzon, Kasanof and Forma, in *The Right to Counsel,* 14 Buff. L. Rev. 428, 433 (1965) estimate 65% to 90% indigency among felony defendants in New York. For brief references, see Note, 1962 U. Ill. L.F. 645, n. 37, and for more extensive citations on the burdens involved, Comment, *Escobedo* v. *Illinois,* 32 U. Chi. L. Rev. 560, 580, n. 92 (1965); and see for anticipated cost analysis under federal legislation, Rep. Emanuel Celler, *Federal Legis. Proposals,* 45 Minn. L. Rev. 697 (1961).

[18] FBI Law Enforcement Bull., Sept., 1952.

tional rights in law enforcement will inescapably cost money.

Let it.

B. The Effect on Law Enforcement.

Some members of this Court have had severe doubts about the effect of the application of these principles in the operation of the criminal law, and some outside criticisms have been uninhibited. Professor Inbau regards *Escobedo* as "the hardest body blow the Court has struck yet against enforcement of law in this nation." [19] More temperate criticism of *Escobedo* develops the view that it "creates unnecessary and undesirable impediments to police investigation." [20]

While figures vary as to the number of crimes which are solved by confessions, that number is clearly extremely large. As Justice Jackson observed in the passage quoted above from *Watts* v. *Indiana*, a lawyer at the interrogation stage may well tell his client to stand mute, and the practical effect will be to eliminate large numbers of confessions.[21]

There have been several congressional inquiries into the problems of police interrogation.[22] Professor Louis B.

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[19] As quoted in Dowling, *Escobedo and Beyond*, 56 J. Crim. L. 143, 145 (1965). Professor Inbau expresses himself also in *Restrictions in the Law of Interrogations and Confessions*, 52 Nw. U. L. Rev. 77 (1957).

[20] Enker and Elsen, *Counsel for the Suspect*, 49 Minn. L. Rev. 47, 48 (1965). See in particular, *Id.* at 62-63, n. 52, on the current developments under the English Judges' Rules.

[21] See Weisberg, "Police Interrogation of Arrested Persons," in *Police Power and Individual Freedom*. 153, 179 (Sowle Ed. 1962).

[22] See *Hearings on the Constitutional Aspects of Police Detention Before the Subcommittee on Constitutional Rights of the Senate*

Schwartz of the University of Pennsylvania has testified that in his experience, very few proper convictions had been lost because of the *Mallory* rule.[23] Senator Dominick noted the contradictory attitudes of the police and prosecutors as to the effect of the *Mallory* rule on the crime rate, with the police uniformly taking the position that the increase in crime in the District is directly related to the *Mallory* rule, while the United States Attorney and the Department of Justice indicate that the rule has very little effect on the releasing of guilty persons.[24]

Deputy Attorney General Ramsay Clark for the Department of Justice testified that the *Mallory* rule had not been

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Committee on the Judiciary, 85th Cong., 2d Sess. (1958) (hereafter, *1958 Hearings*). See also the various Hearings on bills to alter the rule of *Mallory* v. *United States, supra*. *E.g.*, *Hearings on H.R. 5688 and 5.1526 Before the Senate Committee on the District of Columbia*, 89th Cong., 1st Sess., pts. 1-2 (1965) (hereafter *1965 Hearings*). Prior to these Senate Hearings, the House Committee on the District of Columbia had submitted H.R. Rep. No. 176, 89th Cong., 1st Sess. (1965) (hereafter, *1965 Report*) to accompany H.R. 5688.

[23] *1965 Hearings*, pt. 1, at 107.

[24] *Id.* at 299. In earlier hearings, the Deputy Chief of Police for Washington, D.C., had contended that the *Mallory* rule results in freeing guilty persons and unduly hampers law enforcement, *1958 Hearings* 124-35. See also the testimony of Chief Layton, *1965 Hearings*, pt. 1, at 299.

The District Attorney of the District of Columbia, Mr. David Acheson, in 1964 said:

> " . . . Prosecution procedure has, at most, only the most remote causal connection with crime. Changes in court decisions and prosecution procedure would have about the same effect on the crime rate as an aspirin would have on a tumor of the brain. . . . "

Quoted in the address of Judge J. Skelly Wright before the Annual Convention of the International Academy of Trial Lawyers, p. 10 (unpub., 1965), from which many of the conceptions of this brief are drawn.

shown to be a direct causative factor in crime or its increase; and the report of the United States Attorney attributes only two "lost" cases a year to the operation of the *Mallory* rule.[25] On the other hand, a report from the House Committee of the District of Columbia, H. Rep. 176, 89th Cong., 1st Sess. (1965) accompanying House Bill 5688, providing for amendment to the *Mallory* rule, does report an apparent relationship of the increase of the District of Columbia crime rate with *Mallory*.[26] A strong minority report shows that while there is a rise in crime in the District, nothing connects it to the *Mallory* rule or makes the rise attributable to *Mallory* in any way.[27]

There are other conflicting views. The New York City Police Commissioner in September of 1965 estimated that confessions were essential to conviction in 50 per cent of the homicides committed in New York in 1964 and, on the other hand, State Supreme Court Justice Nathan R. Sobel describes the view that confessions are the backbone of law enforcement as "carelessly nurtured nonsense."[28] New York District Attorney Frank S. Hogan says that the police are heavily dependent on confessions to get convictions in many cases and that "the whole purpose of a police investigation is frustrated if a suspect is entitled to have a lawyer during preliminary questioning, for any

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[25] For Mr. Clark's statement, see *id.*, pt. 2, at 495; for that of Mr. Acheson, see note 36, *infra*.

[26] *1965 Report* 5. There is some testimony to the effect that it is very difficult to obtain convictions of criminals where neither scientific evidence nor eye witness identification is available. *Id.* at 65.

[27] *Id.* at 119.

[28] *New York Times*, Nov. 20, 1965, p. 1. Judge Sobel's views are published in N.Y.L.J., Nov. 22, 1965, p. 1, 4-5, and have very comprehensive statistics on various crimes and their relation to confessions.

lawyer worth his fee will tell him to keep his mouth shut." [29] On the other hand, Brooklyn District Attorney Aaron E. Koota believes that a person should have a lawyer "at the moment he comes into contact with the law." While some law enforcement officials claim that 75 to 85 per cent of all convictions are based on confessions, Judge Sobel's study, based on 1,000 Brooklyn indictments from February to April, 1965, showed that fewer than 10 per cent involved confessions.[30]

An extremely experienced point of view is that of Judge George Edwards of the United States Court of Appeals for the Sixth Circuit, who resigned from the Michigan Supreme Court to be Detroit Police Commissioner in 1962 and 1963. Judge Edwards said, "We did take prisoners promptly before a judge. And the town did not fall apart. Murder and pillage did not run rampant." He added that he had attempted to run the Detroit Police Department by United States Supreme Court standards, and that it made law enforcement more effective, convincing more people that "we were moving toward making it more nearly equal in its application to all people, regardless of race or color." [31]

The Criminal Justice Act of 1964, 78 Stat. 552, 18 U.S.C. Sec. 3006A, reflects the belief that early advice of right to counsel is compatible with good law enforcement. The Congressional Committee considered a report of the special committee of the Association of the Bar of the City of New York and of the National Legal Aid Association, which con-

[29] *New York Times*, Dec. 2, 1965, p. 1.

[30] *New York Times*, Nov. 22, 1965, p. 1, pt. 2.

[31] *New York Times*, Dec. 7, 1965, p. 33.

cluded that the public defender "system should come into operation at a sufficiently early stage of the proceedings so that it can fully advise and protect and should continue through appeal."[32] The Congress was also advised of the report of the Attorney General's Committee on Poverty and Administration of Federal Justice, February 25, 1963. This report in turn referred to the 1958 report of the New York City Bar and National Legal Aid Association Committee, asserting that "if the rights of the defendant are to be fully protected, the defense of his criminal case should begin as soon after the arrest as possible." A majority of the Attorney General's Committee endorsed this view, and recognized "strong argument that the time the defendant needs counsel most is immediately after his arrest and until trial."[33]

The Attorney General's Committee "after careful consideration" did not adopt that view for legislative purposes at that time but the actual bill which passed provides that the United States Commissioner for the Court should advise the defendant of his right to be represented by counsel and in appropriate circumstances should appoint counsel for him. 18 U.S.C. Sec. 3006A(b). Coupled with the *Mallory* rule, this for all practical purposes means forthwith advice of the right to counsel almost at once upon arrest.

The District of Columbia is the best testing ground for the effect of the Court's standards since it has been most affected by the *McNabb-Mallory* line of cases and at the same time is most analogous to the states of any part of the federal system. The leading study is *Report and Recom-*

[32] Hearing Before Senate Committee on the Judiciary on S. 1057, p. 24 (1963).

[33] *Id.* 197-205.

mendations of the Commissioner's Committee on Police Arrests for Investigation (1962), commonly known as the Horsky Report, for its chairman, Mr. Charles A. Horsky. The Horsky study shows that a very large number of arrests for investigation have been made in the District of Columbia, the number of persons being arrested on suspicion running about a third of those arrested for felonies.[34] An analysis of hundreds of cases of arrest for investigation, in which persons were interrogated privately, showed that this was not in fact a fruitful source of criminal convictions; only about five per cent were ever charged, and even this exaggerates the practical importance of the procedure.[35] As noted, the former United States Attorney, Mr. David Acheson, reported that only an average of about two cases a year were lost because of the *Mallory* decision.[36]

The Horsky Report is the richest single source on the practical aspects of secret interrogations. On both principle and practical considerations "the committee recommends that arrest for 'investigation' should cease immediately."[37] They invoked directly the principle of Blackstone's Commentaries:

> "To bereave a man of life, or by violence to confiscate his estate, without accusation or trial, would be so

[34] Horsky Report, p. 9. For comparable Chicago experience, with statistical detail on the numbers of persons detained for investigation, see American Civil Liberties Union "Secret Detention by the Chicago Police" (Free Press, Glencoe, Ill., 1959). Based on a study of police records, the report concludes that in 1956 approximately 20,000 persons were held incommunicado for at least 17 hours, and 2,000 for 48 hours or more.

[35] Horsky Report, pp. 33-34.

[36] Horsky Report, p. 17.

[37] Horsky Report, pp. 41-71.

gross and notorious an act of despotism, as must at once convey the alarm of tyranny throughout the whole kingdom; but confinement of the person, by secretly hurrying him to a gaol, where his sufferings are unknown or forgotten, is a less public, a less striking, and therefore a more dangerous engine of arbitrary government." [38]

As a practical matter, we cannot know with assurance whether the amplification of the right to counsel in the interrogation period will severely handicap the police; we end by trading opinions.[39] The best of interrogation, as expounded for example by the principal publicist for secret inquiries, Professor Inbau, makes a poor case for itself as is illustrated in the note attached.[40] But assuming that there may be some unpredictable decline in the efficiency of

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[38] Quoted at Report, p. 43.

[39] See for example the conflict between Inbau, *Police Interrogation—a Practical Necessity, in Police Power and Individual Freedom,* 147 (Sowle ed. 1962) with Weisberg, *Police Interrogation of Arrested Persons: A Skeptical View, id.,* 153.

[40] The following note is taken bodily from Comment, *The Right to Counsel During Police Interrogation,* 53 Cal. L. Rev. 337, 351-52, note 75 (1965):

"75. See Inbau & Reid, *Criminal Interrogation and Confessions* (1962); Kidd, *Police Interrogation* (1954); Gerber & Schroeder, *Criminal Investigation and Interrogation* (1962). The Inbau and Reid book is a very specific and highly illuminating study of recommended techniques of interrogation. A paraphrase of the author's advice to the would-be interrogator might read: Impress the accused with your certainty of his guilt, and comment upon his psychological symptoms of guilt, such as the pulsation of a carotid artery, nail biting, dryness of the mouth, etc.; smoking should be discouraged because this is a tension-reliever for the guilty subject trying desperately not to confess; the sympathetic approach—anyone else under such circumstances would have acted the same way, suggests a less repulsive reason for the crime, and, once he

the conviction machinery, there are some distinctly practical plusses to be balanced against this. As Justice Douglas said in *United States* v. *Carignan*, 342 U.S. 36, 46, 72 Sup. Ct. 97, 96 L. Ed. 48 (1951), when a person is detained without arraignment,

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confesses, extract the real reason, condemn the victim, the accomplice or anyone else upon whom some degree of moral responsibility might be placed; understanding approach—a gentle pat on the shoulder, a confession is the only decent thing to do, I would tell my own brother to confess; forceful approach—exaggerate the charges against the accused, sweet and sour technique (one policeman is hostile to him while other acts as his friend); interrogation of the recalcitrant witness—at first be gentle and promise him police protection, then, if he still refuses to talk, attempt to break the bond of loyalty between him and the accused or even accuse him of the offense and interrogate him as if he were the offender.

"The book written by Lt. Kidd provides fascinating reading for the novice. The following paraphrased extracts offer examples: The officer should not interrogate in a business office where there might be a recording device because he may make some statements which would be embarrassing if played back in court to rebut his testimony; feed upon suspect's likes and dislikes—love of mother, hatred of father, concern for children; never release pressure even when tears begin to flow; don't allow the accused any form of tension release at a critical moment in the questioning, such as a cigarette, a drink of water, or a trip to the washroom; play two co-conspirators against each other (often termed bluffing on a split pair)—claim that one talked and blamed the other, possibly using a false recording to substantiate this claim, continually take one out separately but never question him—the other will believe it necessary to tell his side of the story; aggressive approach—blame accused for crimes he didn't commit, play on the fact that many defendants fear the mental asylum more than jail.

"An interesting article in the Gerber and Schroeder book noted the similarity between the methods of interrogation used today and the practices of the German Inquisition. See Gerber & Schroeder, *op. cit. supra* at 361-62."

See also, for illustration of interrogation methods, Sutherland, *Crime and Confession*, 79 Harv. L. Rev. 21, 31-32 (1965).

> "the accused is under the exclusive control of the police, subject to their mercy, and beyond the reach of counsel or of friends. What happens behind doors that are opened and closed at the sole discretion of the police is a black chapter in every country—the free as well as the despotic, the modern as well as the ancient."

We are not talking with some learned historicity about the *lettre de cachet* of pre-Revolutionary France or the secret prisons of a distant Russia. We are talking about conditions in the United States, in the Twentieth Century, and now.[41]

Moreover, some of the cost and efficiency comes from giving American citizens exactly what they are entitled to under the Constitution. It is, after all, the man's privilege to be silent, *Mallory* v. *Hogan, supra,* and it does smack of denial of equal protection to say that this is a right only for those well educated enough to know about it. But one need not reach to constitutional principle; there are, practically, equally important workaday considerations. As is well developed by Judge Smith in *United States* v. *Richmond,* 197 F. Supp. 125, 129 (D. Conn. 1960):

> "Statements elicited during questioning are bound to be colored to some extent by the purpose of the questioner who inevitably leads the witness in the absence of court control. This coloring is compounded where the statement is not taken down stenographically, but written out as a narrative in language supplied by the ques-

[41] "The 'war on crime' is not a sporadic crisis, here today and gone tomorrow, justifying during its brief combat stage a shelving of long-standing immunities of the citizen." Sutherland, *supra,* n. 40, 79 Harv. L. Rev. at 40-41, supported by contemporary illustrations; and see citations collected in the Horsky Report, pp. 46-47.

tioner. Where the state of mind of the defendant is an issue in the case, as in determining the degree of a homicide, this wording of his account of the crime is of vital importance. . . . Had counsel been available to Reid he might have advised Reid of the danger to one on trial for his life on charges such as were faced by Reid of adopting the language of another in a statement signed by him.

"Reid appears to have been suggestible, as might be expected in view of his age, mentality and education." [42]

Judge Smith's highly practical observations are of special application in the instant case. We deal here with rape and with what is, on the facts, an actual issue of penetration.[43] This defendant was obviously led in his alleged talk about vagina and penis, and had he not made or acquiesced in this very clearly led statement, might have been convicted for a lesser offense.

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[42] We are not unaware that this case was reversed on other grounds, three to two by the Second Circuit, Judges Clark and Waterman dissenting on the issue of rehearing, 295 F. 2d 83 (2d Cir. 1961) and that certiorari was denied, 368 U.S. 948, 82 Sup. Ct. 390, 7 L. Ed. 2d 344 (1962). We respectfully commend it as a good case all the same.

[43] Without the "half-inch" statement in the confession (R. 69), there might have been no rape in this case at all. There was no medical testimony of any rape. In response to the prosecution's questions, the prosecutrix testified that at first the defendant was unable to make penetration; that later he did, but whether with his finger or his penis, she "was not sure" (R. 19). A few lines later, she said he made penetration with his penis (R. 20); but on cross, in response to the question of whether entry had been made "with his finger or his penis," she replied, "I don't know" (R. 32), and later she said, "I guess it was with his penis" (R. 33).

Conclusion

The day is here to recognize the full meaning of the Sixth Amendment. As a matter of constitutional theory and of criminal procedure, if a defendant cannot waive counsel unwittingly in one part of the conviction procedure, he should not be able to waive it at another. As a matter of practicality in law enforcement, we cannot know the precise effects of giving counsel at the beginning as the law does at the end; but we can know that there is not the faintest sense in deliberately establishing an elaborate and costly system of counsel—to take effect just after it is too late to matter. Yet that is precisely the *Miranda* case.

We invoke the basic principles of *Powell* v. *Alabama*: "He requires the guiding hand of counsel at every step in the proceedings against him." When Miranda stepped into Interrogation Room 2, he had only the guiding hand of Officers Cooley and Young.

We respectfully submit that the decision of the court below should be reversed.

Respectfully submitted,

LEWIS ROCA SCOVILLE BEAUCHAMP & LINTON

By JOHN P. FRANK*
JOHN J. FLYNN

January, 1966.

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* Counsel notes with appreciation the research assistance of Mr. Robert Jensen of the Minnesota bar and Mr. Paul Ulrich of the California bar, both clerks in the office of counsel.

APPENDIX

Extracts from record in the companion case of *State* v. *Miranda*, 98 Ariz. 11, 401 P. 2d 716 (1965).

Mr. Turoff: What was your answer to this? Let me repeat the question. Did you make any threats to the defendant? Did you answer that?

A. Yes, I answered that. I didn't make any threats.

Q. Did you use any force on the defendant?

A. No, Sir.

Q. Did you offer the defendant any promises of immunity?

A. No, Sir, I did not.

Q. Officer, were you the arresting officer?

A. Yes, Sir.

Q. Did you arrest the defendant?

A. Yes, Sir.

Q. Are you the officer who brought him into the Interrogation Room?

A. Yes, Sir.

Q. Officer Young, was he also in the Interrogation Room?

A. Yes, Sir, he was with me during the time.

Q. And in your presence, did Officer Young make any threats?

A. No, Sir, he did not.

Q. Did Officer Young use any force on the defendant?

A. No, Sir, he did not.

Q. Did Officer Young make any promises of immunity to the defendant?

A. No, Sir, he did not.

Q. Officer, I ask you again, what was your question to the defendant and what was his answer to that question?

Mr. Moore: Comes now the defendant and objects for the reason—I would like to ask a question on voir dire before I make the objection.

The Court: All right, Mr. Moore.

By Mr. Moore:

Q. Did you say to the defendant at any time before he made the statement you are about to answer to, that anything he said would be held against him?

A. No, Sir.

Q. You didn't warn him of that?

A. No, Sir.

Q. Did you warn him of his rights to an attorney?

A. No, Sir.

Mr. Moore: We object, not voluntarily given.

Mr. Turoff: I don't believe that is necessary.

The Court: Overruled.

By Mr. Turoff:

Q. Would you tell us, Officer, now, what you said to the defendant after Miss McDaniels made her statement and what the defendant said to you regarding this charge.

A. I asked him, I said, "Is this the woman that you took money from?" and he said, "Yes, this is her."

Q. Did you ask him anything else? Was there any further conversation regarding the taking of this money?

A. Yes, Sir, we then—I believe he just volunteered the information and was saying—part of the conversation was with the woman at the time that the occurrence had happened.

Q. I didn't get that, Officer. He told you what conversation he had with her?

A. Yes, he did.

Q. I see; did he tell you also where this took place and when?

A. He wasn't exactly sure of the exact location. It was at approximately 2nd Street just north of Van Buren up around Taylor, somewhere in that vicinity. He wasn't sure of the exact location of the occurrence, but just the approximate location.

Mr. Turoff: I have no further question of this witness.

• • • • • • •

A. No, not right away.

Q. Later on when Miss McDaniels was present, did you have a discussion with the defendant concerning that charge?

A. Yes, Sir.

Q. Who was present at that conversation, Officer?

A. Myself, Detective Cooley, Mr. Miranda and Barbara McDaniels.

Q. I see; prior to that, had you made any threats or used any force on the defendant?

A. No, Sir.

Q. Had you offered the defendant any immunity?

A. No, Sir.

Q. In your presence, had Officer Cooley done any of these acts?

A. No, Sir.

Q. About what time did this conversation take place, Officer?

A. Approximately 1:30.

Q. Shortly after Miss McDaniels made her first statement, is that correct?

A. Yes, Sir.

Q. Can you tell us now, Officer, regarding the charge of robbery, what was said to the defendant and what the defendant answered in your presence?

A. I asked Mr. Miranda if he recognized • • •

• • • • • • •

A. When Mrs. McDaniels was in there, we were not armed—I was not.

Q. You were not?

A. No, Sir.

Q. But the defendant did know you were policemen?

A. Yes, Sir.

Q. And you did question him?

A. Yes, Sir.

Q. And you didn't warn him of his rights?

A. What is that?

Q. You never warned him he was entitled to an attorney nor anything he said would be held against him, did you?

A. We told him anything he said would be used against him, he wasn't required by law to tell us anything.

Q. Did you tell him that or did Mr. Cooley tell him that?

A. We both had told him.

Q. That is all you know about this? You don't know a thing about this except the conversation you heard, this robbery trial, isn't that right?

A. Yes.

Q. The conversation you heard in the interrogation room?

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JOHN F. DAVIS, C

IN THE

Supreme Court of the United States

OCTOBER TERM, 1965.

PEOPLE OF THE STATE OF CALIFORNIA, Petitioner,

No. 584. *vs.*

ROY ALLEN STEWART, Respondent.

On Writ of Certiorari to the Supreme Court of the State of California.

ERNEST ARTHUR MIRANDA, Petitioner,

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THE STATE OF ARIZONA, Respondent.

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On Writ of Certiorari to the Court of Appeals of the State of New York.

SYLVESTER JOHNSON and STANLEY CASSIDY, Petitioners,

No. 762. *vs.*

STATE OF NEW JERSEY, Respondent.

On Writ of Certiorari to the Supreme Court of the State of New Jersey.

BRIEF OF NATIONAL DISTRICT ATTORNEYS ASSOCIATION, AMICUS CURIAE.

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Other Authorities.

Borchard, Convicting the Innocent (1932) 18
Cross, Confessions and Cognate Matters: An English View, 66 Colum. L. Rev. 79, 88 (1966) 20
Devlin, The Criminal Prosecution in England 47 (1960) 5, 15
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Robinson, Massiah, Escobedo and Rationales for the Exclusion of Confessions, 56 J. Crim. L., C. & P. S. 412, 425 (1965) 11
Sutherland, Crime and Confession, 79 Harv. L. Rev. 21, 40 (1965) 23
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BRIEF OF NATIONAL DISTRICT ATTORNEYS ASSOCIATION, AMICUS CURIAE.

QUESTIONS PRESENTED.

1. Does the decision in *Escobedo* v. *Illinois* extend beyond its facts to require, before interrogation, admonishment of the accused of his right to remain silent

and of his right of counsel, with failure to so proceed excluding from evidence any statement obtained thereby?

2. Does the rule announced in *Escobedo* v. *Illinois* have retrospective application?

INTEREST OF AMICUS.

The National District Attorneys Association is an organization of state prosecuting attorneys whose members in their official capacity represent approximately two-thirds of the population of the United States. It is upon these state prosecuting attorneys that the responsibility of presenting the overwhelming majority of criminal cases rests. The express purpose of the Association as amicus curiae is to delineate the grave concern (and the causes therefor) of prosecuting attorneys and law enforcement officers, if not that of all the people, with the adverse affect the Court's decision in these matters could have on the preservation of our free society—its safekeeping for all the people.

It is not for amicus to further discuss, dissect and distinguish, if possible or necessary, the law. Certainly the case law, the legal theories and the peculiar facts in the four matters presented here are thoroughly, indeed proficiently, covered by the parties.

The rules and regulations which have the force of statute are founded not only upon precedent but upon facts—and at times, necessarily, upon hypothesis. Therefore, it is believed that this Association can best serve the Court through the factual information, gathered by members of this Association, on the actual use of confessions. This data is offered for the Court's consideration in arriving at its decision on the questions before it.

In addition to the statistical data, it would seem that amicus can assist the Court by outlining the existing and

foreseeable difficulties as regards clarification, definition and retroactivity in application. Accordingly, with the consent of parties, this brief is respectfully submitted by the Association as evidence of its concern in and for the course of criminal justice, the future state of which will be determined in the matters now before the Court.

SUMMARY OF ARGUMENT.

Re: Interpretation of Escobedo v. Illinois.

Those entrusted by the people with the enforcement and administration of our criminal laws complain, as overburdened persons do, when short cuts are eliminated from their repertoire of expedients for effectively and adequately fulfilling the great burden and responsibility placed upon them. However, they recognize and accept reasonable rules which can be followed, though with some difficulty, and which have benefits far outweighing their inexpediency: *Mapp* v. *Ohio,* 367 U. S. 643 (1961), may well be an excellent illustration. Unlike *Mapp* which conclusively condemned a practice known to be unconstitutional, an extended *Escobedo* v. *Illinois,* 378 U. S. 478 (1964), introduces a heretofore unknown standard of constitutionality.

Few would disagree with most of the Supreme Court decisions affecting law enforcement, finding the reversals (including *Escobedo*) correctly decided upon their facts. The difficulties of effective performance, experienced by those engaged in the enforcement and administration of our criminal laws (including and even emphasizing the judiciary), originate in the fact that the rules are promulgated upon the exceptional case and thereafter are subject to so many different interpretations. Why a case is allowed to advance to the appellate stage or why there is not a confession of error where there is an obvious violation of funda-

mental rights is influenced by local problems. And yet, the entire nation may be penalized for the sins of a few—albeit the case is atypical not only for the nation but for that locality.

The states have been described as fifty different countries. Officers vary from state to state, city to city, department to department. Police officers should not be subjected to symbolism—personifying evil in our midst. There are the good and the bad, the qualified and the unqualified, in the same manner as legislators, judges, firemen or medical doctors. We are a nation of specialists. Police officers, who will be directly affected by any extension of *Escobedo,* are specialists.. Prosecuting attorneys, trial judges and basically all appellate judges—although not specialists in the methodology of crime investigation—have worked closely with the problems and have expressed, almost unanimously, the opinion that *Escobedo* should not be afforded the extreme construction. Those courts which have ruled otherwise have done so because they believed the admonishment to be an inevitable Supreme Court command. Thus, their concern was with avoiding a backlog of cases from the date of *Escobedo* to its actual clarification. *People* v. *Dorado,* 62 Cal. 338, 398 P. 2d 361 (1965).

Those rules and regulations, which find themselves workable not because they are followed but because the populace in the first instance and the trial judges thereafter, both through misunderstanding and understanding, allow the standard to go unenforced, are not a preferred observance. One of the outstanding criminal law authorities in England, if not in the world, expressed this idea of operable-by-default rules in explaining the reason why certain restrictive measures can exist in his country without hindering police investigations: "The law works as well as it does chiefly because the moral authority of the police

enables them to get on without powers." Williams, *Demanding Name and Address*, 66 L. Q. Rev. 465, 476 (1950).

To be effective an admonishment must be more than a ritual. And the benefits received from a properly administered warning would not accrue to the innocent nor to the Culombes, Fikeses, Haleys, Paynes or Recks of our society. The beneficiaries are the professional and the recidivist. Without bestowing or acquiring a benefit, the American people cannot afford to abandon the confession as a form of evidence.

The objective of the admonishment cannot be to place a burden which becomes so onerous that it invokes devised extenuation. To resort to circumvention, although not intentionally illegal, nonetheless may markedly devaluate respect for law and order. A rule which can be rationalized by those who execute it does not offer the solution. The experience of the English in the use of the Judges' Rules is illustrative:

> The Rules undoubtedly require the observance of a very high standard, and it may be a higher standard than the average policeman was in the first instant naturally inclined to adopt. It is difficult to say what extent the spirit of the Rules is infringed because, as I have said *it is the general habit of the police never to admit to the slightest departure from correctness.* Devlin, The Criminal Prosecution in England 47 (1960). (Emphasis added.)

A rule for a rule's sake is not the answer.

In balancing the equities, it is obvious that eventually a point of diminishing returns is reached. The drawbacks which may result from an extension of *Escobedo* beyond its facts should be studied. To establish an absolute "enforcement-type exclusionary rule" can well lead to punishment of the populace rather than the police. Before *Mapp* v. *Ohio*, 367 U. S. 643 (1961), there was a warning to re-

assess given by the Court in *Wolf* v. *Colorado*, 338 U. S. 25 (1949). No one can now doubt that the Supreme Court can and will do as it states. However, crime waits for no man or court. But man can implement and adjust, given notice and a reasonable time to do so. Therefore, would it not be reasonable and proper for the Court to formulate a workable standard, without attaching thereto a dogmatic rule of exclusion? Cannot the state and federal authorities be given an opportunity to establish working rules, to increase the quantity and to improve the quality of their personnel and to otherwise effect the desired result? Certainly such good faith is being registered by governmental and private groups now engaged in these pursuits.

Under the guidance of an opinion by this Court, an advisory rule would afford an opportunity to accelerate research and to effect changes without the disastrous results of impediment and confusion. One step may well destroy that which we know, the other build that which we need. We respectfully request the Court to take the latter course: the advisory rule. We do not presume to suggest to the Court a drafted rule. The Judges' Rules of England were established as an advisory standard by the judges themselves but at the request of the police for their guidance. We would ask the same approach be taken. The members of this Association and prosecuting attorneys and law enforcement officers everywhere in this country stand ready to assist this Court in any manner which will further the objective of the proper enforcement of the criminal laws for the benefit of all the people.

Re: Retrospective Application.

The effect of retroactive application of *Escobedo* would involve all of the problems which such a determination would have had in *Mapp*, but for *Linkletter* v. *Walker*, 381 U. S. 618 (1965) and *Angelet* v. *Fay*, 381 U. S. 654 (1965). The arguments presented by this amicus in *Linkletter* and *Angelet* are relevant and even more pertinent here. The reasoning of *Tehan* v. *Shott*, 34 U. S. L. WEEK 4095 (January 19, 1966), should be extended to *Escobedo* as well.

ARGUMENT.

CONFESSIONS (STATEMENTS) ARE VITAL IN THE ADMINISTRATION OF CRIMINAL JUSTICE IN THE UNITED STATES. THE EFFECT OF ADMONISHMENT OF RIGHT TO REMAIN SILENT AND, IN PARTICULAR, THE RIGHT TO COUNSEL AT THE INTERROGATION STAGE WILL MATERIALLY AFFECT THE ENFORCEMENT OF OUR CRIMINAL LAWS. TO GIVE RETROSPECTIVE APPLICATION TO THE NEW CONSTITUTIONAL STANDARD PROCLAIMED IN ESCOBEDO v. ILLINOIS WILL DIMINISH AND DETER EFFECTIVE LAW ENFORCEMENT. THE NEED IS FOR AN ADVISORY STANDARD, NOT AN EXCLUSIONARY RULE.

The issues before the Court stem from *Escobedo* v. *Illinois*, 378 U. S. 478 (1964), and the requisite clarification of the five principles laid down by the Court in that decision: (1) if the investigation is no longer a general inquiry into an unsolved crime but has begun to focus on a particular suspect; (2) if the suspect has been taken into police custody; (3) if the suspect is interrogated in a manner that lends itself to eliciting incriminating statements; (4) if the suspect has requested and been denied an opportunity to consult with his attorney and (5) if the police have not effectively warned him of his absolute constitutional right to remain silent, then any statement given by the accused is of no evidentiary value.

Two constructions of *Escobedo* have evolved, so-called the strict interpretation and the liberal interpretation. The strict interpretation is: *Escobedo* should be limited to its facts. If the request of the accused to consult with his attorney is refused, any confession elicited is inadmissible as being in violation of his right to have present the guiding hand of counsel—which right he did not intelligently waive.

This is the construction given by the majority of state and federal courts. The liberal interpretation is: no probative evidence may be obtained until and unless the accused has been duly admonished of his absolute right to stand silent to any and all inquiry, and furthermore, of his right to consult with an attorney. This is the construction assumed by a minority of the state and lower federal courts. Because of population and the consequent number of criminal cases, the most prominent advocate of this view is California. *People* v. *Dorado,* 62 Cal. 2d 338, 398 P. 2d 361 (1965). The two other state courts that have given this same interpretation are Rhode Island [*State* v. *Dufour,* 206 A. 2d 82 (R. I. 1965)] and Oregon [*State* v. *Neely,* 239 Ore. 487, 398 P. 2d 482 (1965)]. By having joined with this minority of state appellate courts, the Third Circuit Court of Appeals appears alone among the courts of appeal of the ten circuits. *Russo* v. *New Jersey,* 351 F. 2d 429 (3d Cir. 1965). Pennsylvania has revised its original construction in light of *Russo. Commonwealth* v. *Negri,* 213 A. 2d 670 (Pa. 1965).

I. ANY RULE DERIVED FROM ESCOBEDO v. ILLINOIS SHOULD BE LIMITED TO THE FACTS OF THAT CASE.

A. Escobedo Declares a New Constitutional Standard, Differing From Previous Court Decisions Restricting Police Investigation.

Whatever the purported rule is, it is new. Prior to *Escobedo,* the denial of counsel at any stage preceding arraignment was, at the very most, a factor in the "totality of circumstances" on the issue of voluntariness. Thus, differing from *Mapp* v. *Ohio,* 367 U. S. 643 (1961), and other cases which concerned fundamental rights, the denial of counsel, even upon request, was not a violation of any known constitutional precept. *Crooker* v. *California,* 357 U. S. 433 (1958). And so, when we speak of admonishing

the suspect, the accused or the witness of the right to stand silent and of the right of counsel at all investigatory stages, we embark on an uncharted constitutional course which leaves no opportunity for deviation. Either it is or it is not. It is clear that here there is no stated law, no comfort of precedent. *Escobedo* restrictions will affect the FBI and other federal officers as much as they will state officers. This is not a case where the federal officers have been following a procedure for years through the authority of the Court's supervisory powers, so that it is now time that state officers caught up. Admonishment of the right of counsel has never been required in the United States or England; the admonishment of right to remain silent has served only the military [Uniform Code of Military Justice, 10 U. S. C. § 831], the State of Texas [Tex. Code Crim. P. art. 727] and in England [Judges' Rules, [1964] 1 All E. R. 237].

An analysis of the various leading cases, chronologically from 1936 with their effect upon law enforcement, the courts and the prosecuting attorney of the states warrants consideration here:

Voluntariness. (Beginning with *Brown* v. *Mississippi*, 297 U. S. 278 (1936), to date without enumerating each case.) Although reasoning may differ on individual cases, few will question the rule on voluntariness as applied to the "totality of circumstances" concept in relation to voluntariness. It is to be noted that it always has been understood that "voluntariness" does not mean necessarily "volunteered." *Watts* v. *Indiana*, 338 U. S. 410 (1948). State authorities in general would agree (with one or two exceptions) with the Supreme Court that on the facts, the cases should have been reversed. None of these cases typifies state cases, and, of course, all involve a rather sensational crime, generally murder [25 murders, 1 manslaughter, 1 narcotics case, 4 cases of rape and 2 robberies:

Robinson, *Massiah, Escobedo and Rationales for the Exclusion of Confessions*, 56 J. Crim. L., C. & P. S. 412, 425 (1965)].

Arrest, Search and Seizure. Since the full effect of *Wolf* v. *Colorado*, 338 U. S. 25 (1949), did not come to rest upon the states until *Mapp* v. *Ohio*, 367 U. S. 643 (1961), it is only the results of the latter case that are pertinent here. While police officers, as overburdened public servants, may like the facility of short cuts to investigation, the view that illegal methods, especially flagrant or purposeful violations of the Constitution, should be countenanced by the courts, cannot be defended. The concern, of course, lies with what is "reasonable grounds" and what is "probable cause." There may well be individual cases which would allow opinions to differ, but few would differ with those cases brought to the attention of the Supreme Court. More debate may center upon some of the interpretations of other appellate courts, state and federal. In *United States* v. *Ventresca*, 380 U. S. 102 (1965) and *Linkletter* v. *Walker*, 381 U. S. 618 (1965), the Court provides reasonableness for law enforcement, thus enabling them to perform with diligence. Naturally there is concern when a police officer, who is stated not to be held to the judgment of a "legal technician," is reproved for failing to exercise the judgment which only could be expected from a legal technician. This is true in cases before all courts, in particular the appellate courts with bare majorities. It may be discouraging, but law enforcement officers will continue to do their best, appreciating that generally the courts understand their predicament so that the exception is the rule.

Right to counsel at trial and appeal; transcripts. *Griffin* v. *Illinois*, 351 U. S. 12 (1956), *Hamilton* v. *Alabama*, 368 U. S. 52 (1961), *Gideon* v. *Wainwright*, 372 U. S. 335 (1963), *Douglas* v. *California*, 372 U. S. 353 (1963), *White* v. *Maryland*, 373 U. S. 59 (1963), and others involving right

to counsel at trial and appeal and to transcripts for appeal were not devastating; they directly concerned only a few states and the judicial process, as distinguished from the investigation-prosecution of crimes. Prosecuting attorneys and courts in the large majority of states were surprised at *Gideon,* not knowing beyond the confines of their own borders the practice in other states, and the *Hamilton* and *White* procedures also were foreign to them. For obvious reasons, defendants' demanding to try their cases without an attorney because of dispute with counsel is abhorred by courts and state counsel alike. Law enforcement officers were not affected directly by these decisions.

Other matters. Malloy v. *Hogan,* 378 U. S. 1 (1964): Again the impact was minimal. *Jackson* v. *Denno,* 378 U. S. 368 (1964): Although this decision affected several of our more heavily populated states, yet considering the country as a whole, it produced little change. Again, the direct impact was upon the state courts, not the prosecuting attorneys or law enforcement officers. *Griffin* v. *California,* 380 U. S. 609 (1965): Most prosecuting attorneys and courts were not even aware that this could be done. This procedure was prohibited by constitution, statute or court rule in at least 44 of the 50 states.

Differing from the foregoing, the determination of an absolute principle so unique as *Escobedo,* in any expanded interpretation, will forever frustrate the good law enforcement officer who tries to obey the rulings of this Court, only to find reasonable investigation methods subject to varying confusing findings on each of the principles associated with the *Dorado* interpretation of *Escobedo,* e.g., focus, investigatory stage, admonishment, custody, interrogation, statement-confession, etc.

B. The Effects of a Required Admonishment Will Inhibit the Interrogation of Criminal Suspects Without Benefit to the Innocent.

Will warning an individual of his right to remain silent and of his right to counsel preclude the needed confession? Frankly, no one knows and an empirical study is not possible. But, if the admonishment is without this effect, then, either it is being administered improperly or there is simply no reason for such a rule existing.

By assuming the posture of one accused (acknowledging the obvious limitations of this premise), namely his concern with discovery of the misdeed (if not other misdeeds) and his natural instinct for preserving freedom and life, it is possible to derive a valid answer. Consider his realization, having these innate anxieties, that the police know he is involved. Subjectively we know that misdeeds are not readily admitted. Some of the effects of a required admonishment include:

1.

Problems in the use of acceptable interrogation techniques already exist and to overcome the admonishment adds to that burden.

2.

Every confession will be tainted with the issue of waiver of counsel.

3.

The question then becomes: is waiver possible. If, in reply to an admonishment, the accused asks, "Should I get a lawyer? Why do I need a lawyer? What will a lawyer do for me? etc." Having reached this impasse, must the interrogator simply advise the accused to retain counsel and thereafter stop his attempt to learn the truth, or, is it

permissible for him now to proceed to convince the accused that he does not need an attorney? Can an accused ever effectively waive his right to counsel once he has mentioned, in response to a warning, that maybe he should have one? Thus, another issue to plague the courts is created.

4.

Admittedly, in the pretrial investigatory period which includes time for interrogation, the defendant is at a disadvantage. But in our system of justice this imbalance is adjusted by the rights of the defendant at trial: (a) that he need not be witness against himself; (b) that he is entitled to a unanimous verdict of his peers; (c) that he cannot be again brought to answer, once acquitted; (d) that he must be found guilty beyond a reasonable doubt. Furthermore, there is no right in the state to appeal and there is no discovery procedure to obtain from the defendant himself the names of witnesses, etc. No one would suggest that these trial protections be altered, but if the pretrial investigation, which must involve interrogation of suspects and witnesses (both of whom could or could not be culprits in the crime), is eliminated, then our system of justice must fail but for a concomitant revision in our form of trial. If the foundation of our system of justice is rocked, something must give way; the consequences may not be what this Court, any lawyer, or any citizen would want.

5.

The "fear" of admonishment is that it will benefit only the recidivist and the professional. The first offender and the Culombes, Fikeses, Haleys, Paynes or Recks will not be the beneficiaries. The innocent will take offense to the caution.

6.

Many of the restrictions upon law enforcement, albeit for the good of the individual, must of necessity greatly burden these men who are charged with the protection of the public. That the police officer is the subject of distrust is evidenced by (a) the detailed information required in affidavits to obtain warrants, (b) the required corroboration of informer information, and (c) the trend to accept the suspect's word over that of the police officer. And so, by establishing unworkable requirements do we not further undermine and demoralize the police officer, forcing him to "stretch the truth"? Consider the experience in England with the Judges' Rules:

> The Rules undoubtedly required the observance of a very high standard, and it may be a higher standard than the average policeman was in the first instant naturally inclined to adopt. It is difficult to say what extent the spirit of the Rules is infringed because, as I have said, *it is the general habit of the police never to admit to the slightest departure from correctness.* DEVLIN, THE CRIMINAL PROSECUTION IN ENGLAND 47 (1960). (Emphasis added.)

7.

Exculpatory statements also will not be easy to obtain, thereby inviting defendants to change their minds and perjure themselves on the stand.

8.

Will impossibility of performance force, not only the police to uncover loopholes but the prosecutor and the trial courts as well to pursue this path—objective looking to one side? Trial judges, both state and federal, as well as most appellate courts, in their sympathy with the law enforcement officers' plight, are inclined to encourage law enforcement officers to "avoid" the stringent requirements

of the rules. Is this not apparent in the California District Courts of Appeal application of their *Dorado* rule to those cases not yet considered final? [*E.g.*, Re No Interrogation, *People* v. *Clapper*, 233 A. C. A. 18, 43 Cal. Rptr. 105 (1965), *People* v. *Fork*, 233 A. C. A. 860, 43 Cal. Rptr. 804 (1965); Re Harmless Error, Exculpatory Statements or Admissions, *People* v. *Williams*, 235 A. C. A. 474, 45 Cal. Rptr. 427 (1965) (admitted theft but denied robbery), *People* v. *Cooper*, 234 A. C. A. 699, 44 Cal. Rptr. 483 (1965) (admitted he was chewing marijuana cigarette); Re No "Focus," *People* v. *Jones*, 232 A. C. A. 471, 42 Cal. Rptr. 714 (1965); Re No "Custody," *People* v. *Garrett*, 235 A. C. A. 155, 44 Cal. Rptr. 897 (1965); Re Type of Admonishment, *People* v. *Chaney*, 233 A. C. A. 75, 43 Cal. Rptr. 280 (1965).]

C. Confessions Have an Essential Role and They Satisfy a Useful Purpose in the Administration of Justice.

The fact that confessions are used extensively, as shown by the Appendix, may not necessarily demonstrate justification for their presence. Rationalization of all reason is possible. Despite this logic, an outline of a few of the reasons, without great detail as to "why" or "reason" for the "why," may be of assistance to the Court:

1.

Basically, crimes are covert by nature, and, zealous assertions to the contrary, many crimes are impossible to solve without a confession.

2.

Confessions are the prime source of other evidence. Even if it is possible to solve crimes in the "scientific police laboratory" (a misconception often perpetuated by the police themselves), the evidence that is analyzed often must

come from admissions: the existence of the gun and the location thereof, the location of an automobile (e.g., in an assault), etc. The doctrine of the fruit of the poisonous tree will make an inadmissible confession of even greater consequence.

3.

Critics claim the urgent need is for more and better police officers. Reality dictates that although there be the need, there never will be sufficient police officers to prevent incipient crime and to investigate the millions of crimes committed in the United States. The selection of crimes to be investigated merely will be reduced. Assuming the existence of the required unlimited financing, nevertheless there are not enough FBI-caliber men, with college, law school or other advanced training, available or attainable for the cop's beat. Even on that dark hypothesis, which has some remedy by way of actual training, a "college degree per se does not a good police officer make."

4.

There is a direct corollary between pleas of guilty and confessions. The Appendix data so indicates where such data is available. (The City of Baltimore is an exception which has had the experience wherein custom has put aside the jury trial.) This is even more obvious when a distinction is made of the term "confessions" by eliminating therefrom the "exculpatory statement." It has been said that if all defendants pleaded not guilty and demanded trial by jury, justice in the United States would come to an abrupt halt. Can there be any doubt that an increased call upon court and prosecution personnel and facilities, already overtaxed, would adversely affect the administration of justice in the United States? Although all of us advocate justice, whatever the pecuniary cost, idealism

Although the membership of this Court changes, there remains the need for relative stability of established principles. To foster second-guessing will be detrimental to an orderly society and to the administration of justice.

In the matters now before the Court, arguments have raged and will continue this pursuit until this Court finally resolves them. To further this debate be restatement thereof herein will serve no purpose. The difficulties which the California courts are experiencing with the cases which are not as yet "final" (that is, after conviction but in the process of appeal or subject to appeal, the time therefor not having expired) seem reason enough to consider the national effect upon the administration of justice, such as would make the California situation a mere skirmish. To cite all of the cases would be of no value, but to illustrate this point a *few* of the 1965 reversals of murder convictions (where the punishment was death or life imprisonment) on a *Dorado* interpretation of *Escobedo* are: California Supreme Court: *People* v. *Bostick*, 62 Cal. 2d 820, 402 P. 2d 529 (1965) (4 defendants); *People* v. *Davis*, 62 Cal. 2d 791, 402 P. 2d 142 (1965); *People* v. *Roberts*, 63 A. C. 79, 403 P. 2d 411 (1965); *People* v. *Lilliock*, 62 Cal. 2d 618, 401 P. 2d 4 (1965) (2 defendants); District Courts of Appeal: *People* v. *Benavidez*, 233 A. C. A. 346, 43 Cal. Rptr. 577 (1965); *People* v. *Reid*, 233 A. C. A. 184, 43 Cal. Rptr. 379 (1965). There are many others, including Dorado himself and the defendant, Stewart, now before the Court. Of course, these cases are a mere sampling of the overall effect of *Dorado*, much less what the effect would be were it given retroactive application.

The Appendix of this brief demonstrates, far more than any recitation of theories, the possible effect of a decision to make any *Escobedo* rule retroactive. Of course, if the suggestion for an advisory rule is adopted, no problem lies on this point.

As new rules of conduct are formulated by the Court upon new found constitutional principles, the requiring of retrospective application thereof will frustrate the administration of justice beyond comprehension. While courts may be required to exercise hindsight, police officers only can be expected to follow prospective rules.

III. TO GUIDE LAW ENFORCEMENT OFFICERS, AN ADVISORY STANDARD, AS DISTINGUISHED FROM AN EXCLUSIONARY RULE, SHOULD BE DEVISED.

The exclusionary rule is ineffective at best. It may well be harmful. Whether changes can occur, or will occur in a degree that change is possible, devolves around human nature more so than legal principles, except insofar as the latter is an integral part of the former. This is a fact that even the critics of law enforcement appreciate:

> A practical difficulty in enforcing the constitutional rights of prisoners is the small efficacy of sanctions against official misconduct. In practice, the exclusionary rule alone is available, and it has no direct disciplinary force. The rule is applied only at trial, or perhaps only on appeal, months after the case has been "solved" and after the credit for getting the confession has been duly shared by all concerned. Then disappointed officials can ascribe the blame to the state or federal courts. Only after such rare public disclosures as those in the *Whitmore* case will any discredit fall on the officers.
>
> The only effective way to establish a constitutional regime in the administration of criminal justice is for the administrative superiors of police and prosecutors to insist on it. Sutherland, *Crime and Confession*, 79 Harv. L. Rev. 21, 40 (1965).

And Professor Sutherland may well have stated that appellate judges are not inclined to reverse many cases for this reason as well. To add an even more unpopular com-

pulsory rule of exclusion will not serve the interests of the people, law-abiding and nonlaw-abiding alike, of whom police officers, prosecuting attorneys, state and federal judges and Justices of this Court are servants.

Has not the time arrived for all of these public servants to join with other members of the executive and legislative branches of government in working together toward improving justice? Can this not be accomplished by an advisory rule which provides for reasonable, workable requirements but which does not exclude from court, on the bases of technicalities, the evidence obtained by a police officer attempting in good faith to follow such a rule? There should be no cause for "stretching of the law" (if not of the imagination) by the police officer or the trial or appellate judge, in order to uphold a conviction which should be so upheld but for an unintentional violation of such rule by a police officer seeking to perform his duty. The Advance Sheets readily disclose the means used by the California District Courts of Appeal to evade the stringent *Dorado* rule. What course the police and the trial judges of that state may be pursuing is not known.

Would not the advised use of an exclusionary rule—if limited to the flagrant abuse, the obvious violation or the grossly negligent failure to abide with such a regulation—bring, more forcefully, any improper conduct to the attention of those who are in a position to discipline the recalcitrant? Thus, it would be possible to inaugurate a workable system of redress.

State and federal governments are engaged, at last, in asserting positive action toward the objective of effective and just administration of the criminal law. The needs are obvious, although in all instances the method to accomplish the specific need is not. Surely improvement of the judiciary, the prosecutorial office and the various law enforcement bodies can be made and will be made because of

the present awareness. The various federal programs are to be seen in the presidential message of March 8, 1965, the immediate products being the Law Enforcement Assistance Act and the National Crime Commission. Local governments and private associations, from state to city, are involved in the overall plan. The American Bar Association is now engaged in studies which plan uniformity of trial practices as a means to more efficient justice (Criminal Justice Project headed by Chief Judge J. Edward Lumbard, United States Court of Appeals for the Second Circuit). The International Association of Chiefs of Police, this amicus and other national groups who represent administrators of the criminal laws seek to make changes for the better. There is a revolution in sight. Through the leadership of this Court, much of this promotion has come to fruition.

Fifty states, which are much like fifty countries, with their history of politics, the cultural differences of their ethnic groups and the myriad of other factors which have made them distinct, cannot be welded into a uniform mass overnight. With a national credo, uniformity in administration should be sought insofar as it can be sought. Of course, with human beings in charge perfection can only be a goal. This is not a pessimistic outlook, but rather it is optimistic that such a goal should be set at all.

But, to place, before all else, the opinion that the change must occur immediately by way of a dogmatic exclusionary rule may well frustrate the hoped-for objectives. The exigencies are time and study. The standard of justice in this country is not such that we cannot afford to stay changes, if the foreseeable results are more productive. An advisory rule, in the manner of *Wolf* v. *Colorado*, 338 U. S. 25 (1949) (which, because the times were different, did not precipitate the action warranted), will certainly be heeded now. It will give time to implement and still lead the way.

As we have throughout our entire legal history, we can look to England for the wisdom of experience. There, the formation of the Judges' Rules came at the request of police officers for guidance. While, as has been previously noted, the police of that country do not always adhere to the letter, the Rules are effectual because of the unique rapport between the courts and the police, an example to be encouraged in this country. The advisory Judges' Rules have some workable qualities which would not frustrate the enforcement of our laws. The indulgence of the Court in this suggestion is respectfully requested.

CONCLUSION.

Amicus curiae requests that the Court limit *Escobedo* v. *Illinois*, 378 U. S. 478 (1964), to its facts and that the rule in *Escobedo* be prospective only, in the form of an advisory rule to guide the administrators of our criminal laws.

For these reasons the decision in *California* v. *Stewart* should be reversed and the decisions in *Miranda* v. *Arizona*, *Vignera* v. *New York* and *Johnson* v. *New Jersey* should be affirmed.

Respectfully submitted,

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PROSECUTING ATTORNEYS CONTRIBUTING DATA.

Alameda County, Oakland, California
J. Frank Coakley, District Attorney
Robert H. McCreary, Assistant District Attorney

Sacramento County, Sacramento, California
John M. Price, District Attorney

Hartford County, Hartford, Connecticut
John D. LaBelle, State's Attorney

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Atlanta Judicial Circuit (Fulton County), Atlanta, Georgia
Lewis R. Slaton, Solicitor General

Orleans Parish, New Orleans, Louisiana
Jim Garrison, District Attorney
Charles R. Ward, Chief Assistant District Attorney

City of Baltimore, Baltimore, Maryland
Charles E. Moylan, Jr., State's Attorney
John D. Hackett, Assistant State's Attorney

Wayne County, Detroit, Michigan
Samuel H. Olsen, Prosecuting Attorney
Samuel J. Torina, Assistant Prosecuting Attorney

Hennepin County, Minneapolis, Minnesota
George M. Scott, County Attorney
Donald J. Omodt, Assistant County Attorney

Douglas County, Omaha, Nebraska
Donald L. Knowles, County Attorney

Essex County, Newark, New Jersey
Brendan T. Byrne, County Prosecutor
Barry H. Evenchick, Assistant County Prosecutor

Kings County, Brooklyn, New York
Aaron Koota, District Attorney
Elliott Golden, Chief Assistant District Attorney
Ronald B. Bianchi, Assistant District Attorney

TABLE I.

CONFESSIONS: NATIONAL RELEVANCE
REVIEW OF ALL 1961 CASES.

Jurisdiction	Confessions/ Pleas Of Guilty	Confessions/ Trial Convictions	Confessions/ Trials	Confessions/ Convictions	Confessions/ Prosecutions	Confessions/ Dispositions
California, Sacramento County (Sacramento)	45.3% (351/774)	64.7% (55/88)	57% (63/110)	47% (406/859)	46.9% (414/884)	—
Florida, Eleventh Judicial Circuit[1] (Dade County, Miami)	—	—	—	43.5% (750/1722)	—	35.8% (791/2206)
Maryland, City of Baltimore[1]	29% (61/210)	37% (112/300)	32% (137/428)	33.9% (173/510)	30.9% (198/638)	—
Michigan, Wayne County (Detroit)	—	—	—	—	60.8% (879/1445)	—
New York, Westchester County (White Plains)	84.6% (608/718)	71% (5/7)	80% (8/10)	82% (613/725)	84.7% (616/728)	83.8% (322/742)
Ohio, Hamilton County (Cincinnati)	—	—	—	—	—	64.4% (667/1035)
Ohio, Franklin County (Columbus)	—	—	—	82% (731/891)	—	—
Ohio, Montgomery County (Dayton)	76.8% (483/629)	43.3% (13/30)	38% (19/50)	75% (496/659)	73.8% (502/680)	—

Note: Figures in brackets refer to number of cases which have a record of confessions over the number of case files examined which equals the percentage given in each category.

1. It is clear that the records in these jurisdictions are not complete, in that in many instances the record did not indicate whether a confession (statement) was involved or not.

CONFESSIONS: NATIONAL RELEVANCE
REVIEW OF 1961 CASES BASED PARTLY UPON SAMPLING

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CONFESSIONS: NATIONAL RELEVANCE
REVIEW OF 1961 CASES BASED PARTLY UPON SAMPLING

Jurisdiction	Confessions/ Pleas Of Guilty	Confessions/ Trial Convictions	Confessions/ Trials	Confessions/ Convictions	Confessions/ Prosecutions	Confessions/ Dispositions
California,						
Alameda County[1] (Oakland)	60% (21/35)	—	—	—	—	—
Connecticut,						
Hartford County[2] (Hartford)	53.8% (7/13)	9.5% (2/21)	—	—	—	—
Georgia,						
Atlanta Judicial Circuit[3] (Fulton County, Atlanta)	52.7% (69/131)	—	—	—	47% (71/150)	—
Louisiana,						
Parish of Orleans[4] (New Orleans)	78.4% (22/28)	—	47.8% (22/46)	—	—	—
Minnesota,						
Hennepin County[5] (Minneapolis)	86.7% (26/30)	80.7% (21/26)	80% (28/35)	—	—	—
New Jersey,						
Essex County[6] (Newark)	93% (55/59)	62% (18/29)	53.6% (22/41)	82.9% (73/88)	77% (77/100)	—
New York,						
Kings County[7] (Brooklyn)	47% (51/108)	0% (0/8)	11.8% (2/17)	44% (51/116)	42.4% (53/125)	—
New York,						
New York County[8] (New York)	50% (139/277)	24.4% (23/94)	19% (23/120)	—	—	—
Pennsylvania,						
Philadelphia County[9] (Philadelphia)	—	—	—	50% (189/376)	—	—

Note: Figures in brackets refer to number of cases which have a record of confessions over the number of case files examined which equals the percentage given in each category.

1. Examination of every 25th case.
2. Pleas of Guilty—examination of every 25th case; Trials—all cases checked.
3. Sampling of 10% of all cases prosecuted.
4. Pleas of Guilty—examination of every 25th case; Trials—all cases checked.
5. Pleas of Guilty—sampling of 1 out of 20 cases; Trials—sampling of 35 cases of 65 cases tried.
6. Based on random sampling of 100 cases.
7. Every 25th case checked.
8. Pleas of Guilty—review of every 25th case where pleas came before trial and of all pleas given after trial had commenced; Trials—review of all cases.
9. Review of all cases in which defendants

TABLE III.

CONFESSIONS: NATIONAL RELEVANCE OF PLEAS AND TRIALS—1961.

COMBINED TABLE—DATA OBTAINED BY COMPLETE CHECK OR BY SAMPLING.

Jurisdiction	Confessions/ Pleas of Guilty	Confessions/ Trial Convictions	Confessions/ Trials
California, Sacramento County (Sacramento)	45.3%	64.7%	57%
Maryland, City of Baltimore	29%	37%	32%
Minnesota, Hennepin County (Minneapolis)	86.7%	80.7%	80%
New Jersey, Essex County (Newark)	93%	62%	53.6%
New York, Kings County (Brooklyn)	47%	0%	11.8%
New York, New York County (New York)	50%	24.4%	19%
New York, Westchester County (White Plains)	84.6%	71%	80%
Ohio, Montgomery County (Dayton)	76.8%	43.3%	38%

Note: California, Maryland, New York (Westchester County), and Ohio based upon review of all cases. New York (New York County)—trial convictions and trials based upon review of all cases. All other percentages based upon sampling.

California.

ALAMEDA COUNTY, Oakland
J. Frank Coakley, District Attorney

Data compiled by Robert H. McCreary,
Assistant District Attorney

1960 County Population: 908,209

In "Crime in California," 1961, as compiled in the State's Bureau of Criminal Statistics, the figures for the County of Alameda were: felony filings on defendants—1258; felony defendants—1304; convicted—1229; pleaded guilty—1043.

Examining the Registers of Criminal Actions for the County (County Clerk No. 32134 to and including County Clerk No. 33271) for the year 1961, Mr. McCreary found 888 cases in which guilty pleas were entered. Of the 888 cases, every 25th case was reviewed for a total of 35 cases specifically considered. The check of these cases revealed that extrajudicial confessions were involved in 21 cases; no extrajudicial confessions were involved in 11 cases; no data was available on the confession issue in 3 cases. Thus, 60% of the cases wherein pleas of guilty were registered also contained verifiable extrajudicial confessions.

No data was to be had in the records or files concerning the use or nonuse of confessions at trial, except in the very few cases where appeal transcripts were prepared.

California.

SACRAMENTO COUNTY, Sacramento
John M. Price, District Attorney

Data compiled under the direction of
John M. Price, District Attorney

1960 County Population: 502,778

1961: 884 FELONY PROSECUTIONS
Based on a Review of All Felony Prosecutions

	Pleas of Guilty	Trials[1]	Total
Convictions	774	85	859
Confessions	351	55[2]	406
Relativity: $\frac{\text{Confessions}}{\text{Convictions}}$	45.3%	64.7%	47%
Relativity: $\frac{\text{Confessions } 414}{\text{Prosecutions } 884}$	—	—	46.9%
Relativity: $\frac{\text{Confessions } 63}{\text{Trials } 110}$	—	57%	—

1. Total tried: 110.
2. Total confessions involved in 110 trials: 63, of which 3 found not guilty by reason of insanity.

In 1961 there were 965 felony dispositions, but no data was available on confessions in the total dispositions other than by trials or pleas of guilty (e. g., nolle prosequi).

There remain under the control of the penal authorities 15 defendants who were convicted at trials (as distinguished from pleas of guilty) in which their statements were a factor. Resumes of these cases are as follows:

Superior Court #24754—James Vienni:

Convicted of three counts of armed robbery after trial by jury. An exculpatory-type statement was used at trial to impeach defendant as it varied from his sworn testimony. Conviction was the result of a combination of circumstances: (1) Identification of defendant by four eyewitnesses; (2) Fact defendant had prior felony convictions; (3) Use of district attorney's statement as impeachment.

Superior Court #25294—William Henry Houghton, age 35:

Convicted of assault with intent to commit murder, armed robbery and ex-convict with a gun. Sentenced January 17, 1962; all counts consecutive, and adjudged a habitual criminal. Defendant asked three people to accompany him in a holdup, showed them the gun he intended to use and testified for them; each refused. When arrested defendant made statement that he is fighting for 15 to 20 years of his life—that he had no one to blame but himself, that he was willing to pay for his actions and that he knew he had to.

Superior Court #25356—Robert O. Dingman, age 29:

Convicted of two counts of second-degree burglary. Sentenced to state prison on February 16, 1962. Defendant did not take the stand; however, his confession was introduced against him.

Superior Court #25301—Ervin Lewis Zander, age 19:

Defendant, in conjunction with two others who pleaded guilty, committed an armed robbery. He pleaded not guilty, was convicted on January 30, 1962, and sentenced to California Youth Authority on February 21, 1962. His confession was used against him at trial.

Superior Court #25326—Arthur Davis, age 55:

Convicted of first-degree robbery. Charged November 21, 1961; jury trial; sentenced to state prison February 14, 1962. Defendant, an on-duty policeman in a small town, was look-out while Freeman and DeLouize robbed bar. During investigation Freeman confessed, naming Davis. Had suspicion focused on Davis? By use of electronic device (. . .), made recording of damaging admissions by Davis relative to his part in robbery. This statement vital to conviction as corroboration of Freeman's testimony. Davis now on parole.

Superior Court #25047—Sidney Lewis, age 39:

Convicted of burglary, second; sentenced to one to 15 years on September 27, 1961; affirmed on appeal. No eyewitnesses. Defendant walked into the Los Angeles Sheriff's office and confessed the crime to two officers. Confession used as only means of connecting him to crime. Defendant admitting smashing a jewelry store window and stealing miscellaneous jewelry.

Superior Court #24935—Kenton Dale McHenry, age 32:

Convicted of four counts of incest and one count of lewd and lascivious conduct with a child under the age of 14; sentenced to one to 50 years on each count of incest and one year to life on the child molest. Two eyewitnesses. Admission that one day his wife "came home too soon" was closest thing to a confession in the case. Sentence was imposed August 11, 1961.

Superior Court #24918—Joseph C. Davis, age 34:

Convicted of first-degree robbery; sentenced to five years to life on August 23, 1961. Eyewitnesses, plus defendant confessed to aiding and abetting in the robbery of a service station attendant.

Superior Court #25177—Martha Seach, age 37:

Convicted of attempted burglary, placed on felony probation. No confessions or admissions, but demonstrably false and evasive self-exculpatory statements were introduced against her.

Superior Court #25176—Billy Tildon Brown, age 27:

Convicted of forcible rape; sentenced to three years to life on November 29, 1961. No confession or admissions, but formal statement used to impeach defendant on basis of prior inconsistent statements as to whereabouts at particular times.

Superior Court #25373—William J. Songs, age 49:

Convicted by jury of robbery, first degree, on February 9, 1962. Sentenced to state prison for five years to life on March 1, 1962. Convicted on testimony of eyewitness-victim. Made statement denying crime. Defendant's testimony at trial was, in several material respects, inconsistent with his statement. Statement was, therefore, used on cross-examination of defendant for impeachment.

Superior Court #25415—Jesse Allen, age 48:

Convicted by jury of murder, second degree, on March 14, 1962. Sentenced to state prison for five years to life on March 19, 1962. Made statement confessing shooting an acquaintance in the course of an argument in a pool hall. Convicted upon eyewitness testimony and confession.

Superior Court #25034—Harold Pearl, age 33:

Convicted by jury October 26, 1961, of murder, second degree, and abortion. Sentenced to state prison on November 7, 1961, for five years to life and six months to five years concurrent. There were no eyewitnesses to the

crimes, and defendant was convicted solely on circumstantial evidence. He gave an extrajudicial statement denying involvement. This statement contained demonstrably false statements plus admissions showing a consciousness of guilt. Defendant declined to testify in his own behalf because of probability of damaging cross-examination on the basis of his extrajudicial statement.

Superior Court #25034—Robert Kennedy, age 41:

Convicted by jury October 26, 1961, of murder, second degree, and abortion. Sentenced to state prison on November 7, 1961, for five years to life and six months to five years concurrent. There were no eyewitnesses to the crimes, and defendant was convicted solely on circumstantial evidence. He gave an extrajudicial statement denying involvement. This statement contained demonstrably false statements plus admissions showing a consciousness of guilt. Defendant declined to testify in his own behalf because of probability of damaging cross-examination on the basis of his extrajudicial statement.

Superior Court #24438—Edward Potter, age 34:

Convicted by jury of lewd and lascivious conduct with a child under the age of 14 years (violation of Section 288 of the Penal Code). On January 6, 1961, he was convicted and on January 27, 1961, sentenced to the state prison for a term of one year to life. Defendant convicted on testimony of the victim, age 13, plus his extrajudicial confession.

Connecticut.

HARTFORD COUNTY, Hartford
John D. LaBelle, State's Attorney

Data compiled by John D. LaBelle,
State's Attorney

1960 County Population: 689,555

There were 593 defendants docketed on felony charges for the calendar year 1961.

1961: 319 PROSECUTIONS.

Based on Sampling of Pleas of Guilty and Review of All Trials.

	Pleas of Guilty	Trials[1]
Convictions	13	21
Confessions	7	2
Relativity: Confessions / Convictions	53.8%[2]	9.5%

1. Total tried 33 of which 21 were convicted; 6 were acquitted; 4 were found not guilty by reason of insanity and committed to state mental institution; 2 were found guilty of lesser charges.

2. Based on an examination of approximately every 25th case, for a total of 13 files checked. A review of these files disclosed that in 7 cases extrajudicial confessions had been made by the defendants.

There remain under the control of penal authorities 15 of the defendants convicted (by plea or trial) of felonies. Of the defendants so incarcerated, 8 of them confessed. Since all eight of these cases involved pleas of guilty, resumes thereof are not set out here.

Maryland.

CITY OF BALTIMORE
Charles E. Moylan, Jr., State's Attorney

Data compiled by John D. Hackett,
Assistant State's Attorney
1960 City Population: 939,024

Maryland, a common law state, lists many statutory felonies of other jurisdictions as misdemeanors, e.g., daytime and store house burglaries, both of which comprise a sizeable number of indictments in the City of Baltimore. Also many felony charges result in misdemeanor convictions under multiple-type indictments. Consequently, the separation of felonies and misdemeanors in the State of Maryland cannot afford a meaningful comparison with these classifications as employed in other states. In a number of files the records do not indicate whether a confession was used or not, as reflected by a sampling set out in the original data.

In Baltimore the guilty plea is infrequent; likewise, the jury trial is notably rare. Hearings are almost exclusively by the bench: it is possible for as many as four or five cases to be disposed of in one day by one judge and by one prosecuting attorney. The experience of the State's Attorney has been that the small number of guilty pleas have resulted from defense counsels' concern with defendants' stock claim in their petitions that counsel was "professionally incompetent."

1961: 638 Felony Prosecutions

Based on Review of All Felony Prosecutions

			Pleas of Guilty	Trials	Total
Convictions			210	300	510
Confessions			61	112	173
Relativity:	Confessions / Convictions		29%	37%	33.9%
Relativity:	Confessions / Prosecutions	198 / 638	—	—	30.9%
Relativity:	Confessions / Trials	137 / 428	—	32%	—

Defendants still incarcerated where confessions were used in their cases number 33.

Resumes of every 25th case of the 198 cases tried in which confessions were used (for a review of 8 cases) follow (cases selected reflect defendants still incarcerated which fall closest to the actual 25th case):

1. Case No. 682, William Holmes, then age 49, convicted of murder in the first degree, court trial, court appointed attorney, on December 18, 1961 (companion conviction for rape, sentence suspended). Sentenced to life imprisonment on January 5, 1962. No appeal taken. No eyewitness. Confession admits sexual intercourse, binding and gagging of victim, abandoning victim behind locked door, and returning in week's time to find the victim dead. Psychiatric examination completed pre-trial: diagnosis:—legally sane then, legally sane at time of trial.

2. Case No. 1535, Sylvester Alphonse Evans, then age 18, convicted of murder in the first degree on October 24, 1961, court trial, court-appointed attorney.

Sentenced to life imprisonment on March 16, 1962 in the Maryland Penitentiary. Motion for new trial, other court-appointed attorney, heard, denied. Appeal not taken. Defendant identified during trial. Confession admits joining group of youths in pool room, leaving en masse to punish others for "messing" with his sister, a confrontation of sister and victim, age 14, in front of ten friends and beating of victim by group. Confession also admits taking shot gun, on the following night to a "rumble" with victim's friends, chasing the victim and shooting as he fled down the alley. Defendant also admits an immediate change of clothing to avoid police detection.

3. Case No. 1031, Floyd Jorstad, then age 34, convicted on April 7, 1961, after pleading guilty to armed robbery of $2863.00 from bank teller, refused court appointed counsel. Sentenced to nine years in the Maryland Penitentiary on April 7, 1961. Four eyewitnesses identified defendant in police lineup and trial. Statement admitted, contains story of arrival in Baltimore City via freight car to study historical monuments, and makes no reference to bank hold up.

4. Case No. 2165, Paul D. King, then age 45, convicted of second degree murder on September 25, 1961, after entering guilty plea with retained attorney. Sentenced to 18 years in the Maryland Penitentiary on September 25, 1961. No appeal taken. Pre-trial psychiatric report: diagnosis—legally sane. One eyewitness identified defendant at trial. Confession admits slapping, chasing and shooting victim following argument in victim's home after evening date refusal. Defendant, a

longshoreman, also admitted carrying unlicensed gun at all times.

5. Case No. 2652, Emory McNeal, then age 37, convicted on August 9, 1961, of armed robbery, court trial, court-appointed attorney. Electroencephalograph studies ordered by court: diagnosis—no brain injury. Sentenced to 10 years in the Maryland Penitentiary on August 9, 1961. No appeal taken. Both cab driver victims identified defendant at trial. One confession admits hold up in attempt to get money for drink. Other confession admits drinking and "amnesia" concerning possession of leather pocket watch of victim.

6. Case No. 4080, James D. Clay, then age 27, convicted on December 11, 1961 of two cases of armed robbery and assault, court trial, court-appointed counsel, guilty plea. Sentenced to 20 years in the Maryland Penitentiary on December 11, 1961. No appeal taken. Both victims identified defendant at trial. The one confession admits planning with another and execution of robbery of one victim, a used-car office. Denial of weapon used with admission of hand in pocket and death threat. Other confession admits planning with two others, execution of robbery and beating of barber who resisted hold up trip.

7. Case No. 442, Matthew Forrester, then age 26, convicted on January 17, 1962 of mayhem and assault to rob, court trial, court-appointed attorney. Sentenced to ten years in the Maryland Penitentiary, after denial of motion for new trial, by another court-appointed attorney, on June 7, 1962. No appeal taken. Victim, who lost an eye and is deaf, identified defendant as one of four men who as-

saulted him, ripped off his trousers and fled scene with victim's money. Statement asserts defendant only offered victim handkerchief to stop face bleeding and carrying victim into tavern wash room, admits sharing loot taken from victim.

8. Case No. 4793, William Cole, then age 22, convicted on January 24, 1962, of armed robbery, court-appointed counsel. Sentenced to ten years in the Maryland Penitentiary on January 24, 1962. No appeal taken. Truck driver victim identified defendant on street at time of arrest and at trial. Confession admits planning with codefendant to "get some money", agreement to rob truck driver, concealed "gun" in coat pocket, beating of victim, flight and chase by police cruiser and admission of lies to conceal identity when first questioned.

Michigan.

WAYNE COUNTY, Detroit
Samuel H. Olsen, Prosecuting Attorney

Data compiled under the direction of Samuel J. Torina, Chief Appellate Attorney, by the Criminal Investigation Division, Detroit Police Department

1960 County Population: 2,666,297

1961: 1445 PROSECUTIONS.

Crime	Prosecution	Conviction	Confession	Relativity: Confession/ Prosecution
Unlawful driving away auto and possession of stolen auto	392	270	233	52%
Uttering & publishing; larceny over $100 (shoplifting)	337	331	241	71.5%
Homicide	115	105	61	53%
Narcotic violations	240	197	124	51.7%
Kidnapping, extortion, arson, larceny by trick	24	5	7	29%
Robbery	181	170	148	81.7%
Burglary	62	60	40	64.5%
Forcible rape	74	56	18	24%
Carrying concealed weapon; possession of burglar tools; receiving and concealing stolen property over $100	20	18	7	35%
Total	1445	1216	879	60.8%

Minnesota.

HENNEPIN COUNTY, Minneapolis
George M. Scott, County Attorney

Data compiled by Donald J. Omodt, Assistant County Attorney with the assistance of Charles Rogers, Investigative Clerk, County Attorney's Office

1960 County Population: 842,854

In 1961, felony dispositions totaled 658. There were 593 pleas of guilty entered; in a sampling of 1 out of 20 cases (30 cases checked), the ratio of confessions to convictions was 86.7%. A total of 65 cases were tried: 50 convictions and 14 acquittals. A sampling of 35 of these cases revealed a confession to conviction ratio of 80.7% and a confession to prosecution ratio of 80%.

The following two charts disclose the detail of the samplings:

PLEAS OF GUILTY.

Type of Crime	Cases	Signed Confession	Oral Confession	Exculpatory Statement	Defendant Stood Silent	Defendant Still Incarcerated
Robbery	12	9		1	2	5
Rape	1	1				1
Narcotics	3	3				0
Assault	2	1	1			0
Indecent Assault	1				1	0
Murder	3	3				2
Sodomy	3	2		1		0
Carnal Knowledge	2	1			1	1
Arson	1	1				1
Abortion	2	1		1		0
	30	22	1	3	4	10

TRIALS—COURT OR JURY

Type of Crime	Number of Trials	Found Guilty by Court or Jury	Acquitted	Signed Confession	Oral Confession	Exculpatory Statement	Defendant Stood Silent	Totals	Defendant still Incarcerated
Robbery	3	3		*1/0		2/0		3/0	2
Grand Larceny	5	4	1	1/0	1/1	1/0	1/0	4/1	0
Forgery	4	4		1/0	1/0		2/0	4/0	0
Using Auto	2	1	1			1/1		1/1	1
Swindling	1	1				1/0		1/0	0
Burglary	9	5	4	0/1	0/1	4/1	1/1	5/4	3
Rape	5	5		1/0	1/0	3/0		5/0	1
Narcotics	1	1			1/0			1/0	0
Assault	1		1	0/1				0/1	0
Insufficient Fund Checks	1	1					1/0	1/0	0
Criminal Negligence	1	1			1/0			1/0	0
Indecent Assault	1		1			0/1		0/1	0
Bribery	1		1				0/1	0/1	0
	35	26	9	4/2	5/2	12/3	5/2	26/9	7

* Above the slanted line indicates "of the number found guilty"; below the slanted lines indicates "of the number acquitted."

New Jersey.

ESSEX COUNTY, Newark
Brendan T. Byrne, County Prosecutor

Data compiled under the direction of Barry H. Evenchick, Assistant County Prosecutor by Charles H. Acocella, County Investigator and Evan E. Miles, County Detective, both on the staff of the County Prosecutor

1960 County Population: 923,545

1961: SAMPLING OF 100 CASES

			Pleas of Guilty	Trials	Total
Convictions			59	29	88
Confessions			55	18	73
Relativity:	Confessions / Convictions		93%	62%	82.9%
Relativity:	Confessions	77			
	Prosecutions	100	—	—	77%
Relativity:	Confessions	22			
	Trials	41	—	—	53.6%

A chart detailing the review of each individual case is filed in the Office of the Clerk of the Supreme Court.

New York.

KINGS COUNTY, Brooklyn

Aaron E. Koota, District Attorney

Data compiled under the direction of Elliott Golden, Chief Assistant District Attorney, by Ronald B. Bianchi, Assistant District Attorney

1960 County Population: 2,627,319

Number of felony dispositions in 1961:		3334
Number of defendants convicted	2890	
Number of pleas of guilty	2695	
Number of trials (195 convictions; 217 acquittals)	412	

1961: 3107 FELONY PROSECUTIONS

Based Upon Sampling of Every 25th Case

		Pleas of Guilty	Trials	Total
Convictions		108	8	116
Confessions		51	0	51
Relativity: Confessions / Convictions		47%	0%	44%
Relativity: Confessions / Prosecutions	53 / 125	—	—	42.4%
Relativity: Confessions / Trials	2 / 17	—	—	11.8%

Of the 108 pleas of guilty, the records indicated 51 confessions, 43 no confessions, 14 no data available. This again shows that the percentage of confessions is low because it is probable that in some of the cases wherein no data was available confessions were involved. In the 8 trial convictions, the files showed 7 without a confession and 1 with

Ohio.

HAMILTON COUNTY, Cincinnati
Melvin G. Rueger, Prosecuting Attorney

Data compiled by Assistant Prosecuting Attorneys

1960 County Population: 864,121

The data was obtained by Mr. Rueger's assigning the review of the 1961 felony cases to members of his staff.

In a count of 1035 felony dispositions, there was a combined conviction figure of 926 (220 by trials; 706 by guilty pleas); furthermore, there were 667 extrajudicial confessions involved in the total felony count, being 64.4% of these cases.

Ohio.

MONTGOMERY COUNTY, Dayton
Lee C. Falke, Prosecuting Attorney

Data compiled by Walter H. Rice,
Assistant Prosecuting Attorney
1960 County Population: 527,080

There were 756 felony dispositions, but data regarding confessions as to those cases dismissed, nol-prossed, etc. is not available.

1961: 680 FELONY PROSECUTIONS[1]
Based on Review of All Felony Prosecutions

			Pleas of Guilty	Trials	Total
Convictions			629	30	659
Confessions			483	13	496
Relativity:	Confessions / Convictions		76.8%	43.3%	75%
Relativity:	Confessions / Prosecutions	502 / 680	—	—	73.8%
Relativity:	Confessions / Trials	19 / 50	—	—	38%

1. Pleas of Guilty (629) plus Trials (51).

1961: 51 TRIALS (JUDGE OR JURY)

Based on Review of All Cases Tried

	Total	Confessions Employed	Percentage of Confessions
Convictions	30	13	43.3%
Acquittals	21	6	28.6%
Percentage of Convictions	58.8%	68.4%	—

There remain incarcerated 6 defendants convicted at trials (judge or jury) through the use of confessions; a resume of these cases follows:

1. Case 22434, Billy Joe Humphrey, age 33 years—convicted on May 3, 1961 by a three-judge panel, of murder in the first degree while perpetrating a Robbery; sentenced to life imprisonment in the Ohio State Penitentiary. Defendant gave full written statement which explained all details and corroborated dying declaration of complainant.
2. Case 22459, Ben G. Holston, age 38 years—convicted on August 11, 1961 by a jury, of Murder in the first degree, with a recommendation of mercy; sentenced to life imprisonment in the Ohio State Penitentiary. Defendant gave full written statement, corroborating all details of witnesses and explaining all elements of shooting.
3. Case 22541, Raymond Byrd, age 33 years—convicted on July 7, 1961 by a jury, of armed robbery; sentenced to a term of 10-25 years in the Ohio State Penitentiary. Defendant gave full written statement which corroborated complaining witness' testimony. Defendant was on parole at the time of offense.
4. Case 22752, Alonzie Phillips, age 32—convicted on

November 29, 1961 by a jury, of armed robbery; sentenced to 10-25 years in the Ohio State Reformatory. Defendant gave full written statement concerning this and other armed robberies; said statement corroborated testimony of the complaining witness.

5. Case 22730, Ronald Edwin Lawson, age 21 years—convicted on September 12, 1961 by a jury, of operating a motor vehicle without the owner's consent; sentenced to a term of 1-20 years in the Ohio State Reformatory. Defendant gave oral statement corroborating the testimony of an accomplice. Defendant was on parole at the time of the offense.
Note: Defendant was released on parole in 1963 but returned as a parole violator on July 7, 1964 and is presently incarcerated.

6. Case 22489, Paul Edward Coble, age 30 years—convicted on October 17, 1961, by a jury, of Grand Larceny; sentenced to a term of 1-7 years in the Ohio State Reformatory; said jury verdict was affirmed on appeal. Defendant gave full written statement which corroborated accomplice testimony. Defendant was on parole at time of offense.
Note: Defendant was released on parole in 1963 but returned as a parole violator in May of 1965 and is presently incarcerated.

Pennsylvania.

PHILADELPHIA COUNTY, Philadelphia
James C. Crumlish, Jr., District Attorney (to 12/31/65)
Arlen Spector, District Attorney (effective 1/1/66)

Data compiled under the direction of
Richard A. Sprague, Chief Assistant District Attorney, Prosecution Department, by the County Detectives Staff of the Office of the District Attorney

1960 County Population: 2,002,512

In a review of 376 cases in which defendants were convicted of a crime and sentenced to a term of imprisonment of at least two years, confessions were obtained in 189 of these cases. The percentage of confessions in such cases is 50%.

JUDGES' RULES [1964] 1 ALL. E. R. 237-239.

(Note: In [1964] All England Reports 237-240, coverage of the latest Judges' Rules (effective January 27, 1964) have been reported by N. P. Metcalfe as coming from Home Office Circular No. 31/1964, dated January, 1964, in a pamphlet entitled "Judges' Rules and Administrative Directions to the Police." Footnote (2) is set out verbatim except for deletions which refer to other footnotes. The complete unabridged Judges' Rules, as given in said Reports, are also included. Appendix B which is entitled "Administrative Directions on Interrogation and the Taking of Statements," involving the interpretation and directives from the Home Office is not reproduced in this brief.)

"(2) A note printed before the Judges' Rules in Appendix A in the pamphlet . . . explains that the judges control the conduct of trials and the admission of evidence against persons on trial before them, but do not control or in any way initiate or supervise police activities or conduct. The rules do not purport to deal with many varieties of conduct which might render answers and statements involuntary and therefore inadmissible, but deal merely with particular aspects of the matter. . . .

"Appendix A, in the introduction before the terms of the Rules are set out, contains the following statement: 'These Rules do not affect the principles (a) that citizens have a duty to help a police officer to discover and apprehend offenders; (b) that police officers, otherwise than by arrest, cannot compel any person against his will to come to or remain in any police station; (c) that every person at any stage of an investigation should be able to communicate and to consult privately with a solicitor. This is so even if he is in custody provided that in such a case no unreasonable delay or hindrance is caused to the proc-

esses of investigation or the administration of justice by his doing so; (d) that when a police officer who is making inquiries of any person about an offense has enough evidence to prefer a charge against that person for the offense, he should without delay cause that person to be charged or informed that he may be prosecuted for the offence; (e) that it is a fundamental condition of the admissibility in evidence against any person, equally of any oral answer given by that person to a question put by a police officer and of any statement made by that person, that it shall have been voluntary, in the sense that it has not been obtained from him by fear of prejudice or hope of advantage, exercised or held out by a person in authority, or by oppression.

'The principle set out in para. (e) above is overriding and applicable in all cases. Within that principle the Judges' Rules are put forward as a guide to police officers conducting investigations. Non-conformity with these rules may render answers and statements liable to be excluded from evidence in subsequent criminal proceedings.' "

JUDGES' RULES.

"1. When a police officer is trying to discover whether, or by whom, an offense has been committed he is entitled to question any person, whether suspected or not, from whom he thinks that useful information may be obtained. This is so whether or not the person in question has been taken into custody so long as he has not been charged with the offence or informed that he may be prosecuted for it.

"2. As soon as a police officer has evidence which would afford reasonable grounds for suspecting that a person has committed an offence, he shall caution that person or cause him to be cautioned before putting to him any questions, or further questions, relating to that offence.

The caution shall be in the following terms:

'You are not obliged to say anything unless you wish to do so but what you say may be put into writing and given in evidence.'

"When after being cautioned a person is being questioned, or elects to make a statement, a record shall be kept of the time and place at which any such questioning or statement began and ended and of the persons present.

"3. (a) Where a person is charged with or informed that he may be prosecuted for an offence he shall be cautioned in the following terms:

'Do you wish to say anything? You are not obliged to say anything unless you wish to do so but whatever you say will be taken down in writing and may be given in evidence.'

"(b) It is only in exceptional cases that questions relating to the offence should be put to the accused person after he has been charged or informed that he may be prosecuted. Such questions may be put where they are necessary for the purpose of preventing or minimising harm or loss to some other person or to the public or for clearing up an ambiguity in a previous answer or statement.

Before any such questions are put the accused should be cautioned in these terms:

'I wish to put some questions to you about the offence with which you have been charged (*or* about the offence for which you may be prosecuted). You are not obliged to answer any of these questions, but if you do the questions and answers will be taken down in writing and may be given in evidence.'

Any questions put and answers given relating to the offence must be contemporaneously recorded in full and

the record signed by that person or if he refuses by the interrogating officer.

"(c) When such a person is being questioned, or elects to make a statement, a record shall be kept of the time and place at which any questioning or statement began and ended and of the persons present.

"4. All written statements made after caution shall be taken in the following manner: (a) If a person says that he wants to make a statement he shall be told that it is intended to make a written record of what he says. He shall always be asked whether he wishes to write down himself what he wants to say; if he says that he cannot write or that he would like someone to write it for him, a police officer may offer to write the statement for him. If he accepts the offer the police officer shall, before starting, ask the person making the statement to sign, or make his mark to, the following:

'I, ..., wish to make a statement. I want someone to write down what I say. I have been told that I need not say anything unless I wish to do so and that whatever I say may be given in evidence.'

"(b) Any person writing his own statement shall be allowed to do so without any prompting as distinct from indicating to him what matters are material.

"(c) The person making the statement, if he is going to write it himself, shall be asked to write out and sign before writing what he wants to say, the following:

> 'I make this statement of my own free will. I have been told that I need not say anything unless I wish to do so and that whatever I say may be given in evidence.'

"(d) Whenever a police officer writes the statement, he shall take down the exact words spoken by the person

making the statement, without putting any questions other than such as may be needed to make the statement coherent, intelligible and relevant to the material matters; he shall not prompt him.

"(e) When the writing of a statement by a police officer is finished the person making it shall be asked to read it and to make any corrections, alterations or additions he wishes. When he has finished reading it he shall be asked to write and sign or make his mark on the following certificate at the end of the statement:

> 'I have read the above statement and I have been told that I can correct, alter or add anything I wish. This statement is true. I have made it of my own free will.'

"(f) If the person who has made a statement refuses to read it or to write the above mentioned certificate at the end of it or to sign it, the senior police officer present shall record on the statement itself and in the presence of the person making it, what has happened. If the person making the statement cannot read, or refuses to read it, the officer who has taken it down shall read it over to him and ask him whether he would like the correct, alter or add anything and to put his signature or make his mark at the end. The police officer shall then certify on the statement itself what he has done.

"5. If at any time after a person has been charged with, or has been informed that he may be prosecuted for an offence a police officer wishes to bring to the notice of that person any written statement made by another person who in respect of the same offence has also been charged or informed that he may be prosecuted, he shall hand to that person a true copy of such written statement, but nothing shall be said or done to invite any reply or comment. If that person says that he would like to make a statement in reply,

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IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1965

No. 759

ERNESTO A. MIRANDA,

Petitioner,

vs.

THE STATE OF ARIZONA,

Respondent.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF ARIZONA

BRIEF FOR RESPONDENT

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IN THE SUPREME COURT OF THE UNITED STATES

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ON WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF ARIZONA

BRIEF FOR RESPONDENT

OPINION BELOW, JURISDICTION, CONSTITUTIONAL PROVISIONS INVOLVED.

Pursuant to Rule 40, Subd. 3, Rules of the Supreme Court, 28 U.S.C. Rules, as amended, the respondent accepts petitioner's presentation of the above referenced portions of the brief.

QUESTION PRESENTED

While your respondent accepts the legal substance of the Question Presented as posed by the petitioner,

serious issue is taken with the descriptive phrases, "poorly educated, mentally abnormal".[1] The propriety of this description of the petitioner, insofar as it may enhance the question presented for review, is no doubt one of the key issues to be decided by the Court and respondent reserves the right to present argument, *infra,* concerning the description's accuracy and impact.

STATEMENT OF THE CASE

Pursuant to Rule 40 of this Court, *supra,* respondent deems it necessary to set forth additional facts from the record of this case which are considered essential to the complete resolution of the issues presented for review.

A psychiatric report is part of the record (R. 6) and has been referred to by petitioner in his Statement of the Case.[2] The totality of this report is essential for an adequate determination of critical factual and background matters, and the report is therefore fully incorporated by reference into this Statement of the Case and reprinted verbatim in Appendix A, *infra.*

The psychiatrist quoted the petitioner as making the following statements:[3]

"Don't worry. If I had wanted to rape you, I would have done it before. [R. 7]

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[1] Brief of Petitioner, at 2.

[2] Id. at 3.

[3] These are in addition to those quoted responses to proverbs cited in petitioner's brief, Id. n. 1.

"You don't have to scream. I am not going to hurt you. [R. 7]

"I didn't know how to ask her for forgiveness. [R. 7]

"I never could get adjusted to her. [R. 8]"

The psychiatrist sets forth in detail Miranda's experience with law enforcement agencies.[4] (R. 8)

Petitioner made a written statement concerning the events in question (State's Exhibit 1; R. 41, 69). Petitioner makes selected references to the statement.[5] Respondent incorporates the whole of this written instrument into this brief; it is reprinted herein as Appendix B, *infra.*

A portion of the statement was typewritten and part of it was written in long-hand by the petitioner himself (R. 40, 41). The following portion of the statement was actually written by the petitioner in his own hand:

"E.A.M. Seen a girl walking up street stopped a little ahead of her got out of car walked towards her grabbed her by the arm and asked to get in the car. Got in car without force tied hands & ankles. Drove away for a few miles. Stopped asked to take clothes off. Did not, asked me to take her back home. I started to take clothes off her without any force and with cooperation. Asked her to lay down and she did

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[4] 1) Aged 14, Stolen Car, Probation.
2) Three weeks later, Fort Grant (Arizona Industrial School for Boys), 6 months.
3) Assault and Attempted Rape, 1 year sentence.
4) Aged 17, Peeping Tom charge, Los Angeles, Probation.
5) Arrested twice, Los Angeles, Suspicion of Armed Robbery.
6) Military service, Peeping Tom charge, confinement and Undesirable Discharge.
7) December 1959, Dwyer Act Violation, Federal Penitentiary.

[5] Brief of Petitioner, n. 3.

principles therein announced, considered within the context of that decision as it discusses not only the particular facts of the case but also the significance of the prior decisions of this Court on the same subject matter, implement an exclusionary rule directed to deter the police from affirmative conduct calculated, under the facts of any given case, to deny an accused from consulting with counsel. Such a rule, in proper perspective and balance, will protect the accused from any infringement of his right to counsel, while not unduly or unnecessarily curtailing the oft times essential investigative questioning of a suspect.

ARGUMENT

I

INTRODUCTION

Petitioner states that his life for all practical purposes was over when he walked out of Interrogation Room #2 on March 13, 1963.[8] The real fact is that Miranda's life was unalterably destined ten days earlier during the late evening hours of March 2 and the early morning hours of March 3, when he kidnapped and raped his victim, Patricia Wier. What followed must not be described in cynical terms as "the ceremonies of the law";[9] they were, and are, the carefully ordained processes of our judicial system, designed, at the optimum, to discover the truth, mete out justice to all, insure the guilty their just and proper recompense and vindicate the innocent. To be sure,

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[8] Brief of Petitioner, at 10.

[9] Ibid.

thoroughly interwoven into these processes at all stages and levels is the implementation and zealous protection of those cherished rights and privileges guaranteed to all by the Constitutions of the United States and the several states; no police officer, prosecutor or judge dedicated to the basic precepts of our system of government advocates that it should be any different.

Unfortunately, or perhaps fortunately, so long as human beings rather than computers administer the processes of justice, mistakes and error will occur and injustices will be done. The courts of our land, including this Court with its highest and most final jurisdiction, are daily exposing and correcting these mistakes to the best of their ability. The question here before the Court is whether there was such a mistake or error in this case of a dimension to result in the denial of petitioner's right to counsel as set down in the Constitution of the United States, and as proclaimed by this Court in its decisions thereunder.

II

THERE ARE NO INHERENT DEFECTS EITHER IN THIS DEFENDANT, THE OPERATION OF LAW ENFORCEMENT AGENCIES, OR IN OUR SYSTEM OF CRIMINAL JUSTICE, WHICH REQUIRE A RULE OF THE CONSTITUTIONAL IMPACT AND PROPORTIONS HERE SOUGHT BY PETITIONER.

A. THE DEFENDANT.

The very description of the petitioner in his Question Presented[10] subtlely introduces a factual issue into

[10] Id. at 2.

this case which is of the gravest importance in resolving the ultimate legal question.

The words so carefully used were "poorly educated, mentally abnormal". No doubt other descriptive words and phrases could have been added—poor, motherless, unloved, downtrodden, culturally deprived, misguided, unguided, harassed, *ad infinitum.*

It is practically impossible to pick up a national magazine, professional journal, or listen to an address without some dramatice usage of these descriptive adjectives to characterize some greater or lesser portion of the American population.[11] And in the proper perspective, such attention, whether it be by this Court,[12] the Congress,[13] the executive,[14] or state and local governments,[15] is long overdue and, hopefully, will do something about the root-source of our most perplexing problems—not the least of which is the rising crime rate.[16]

However, to use these heart-rending descriptions in an attempt to justify or excuse the knowing and deliberate violation of our criminal statutes and the im-

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[11] E.g. **Nine "Unadoptable" Children Joined by Love,** Look Magazine, Oct. 19, 1965, at 54; **Winters, Counsel for the Indigent Accused in Wisconsin,** 49 Marq. L. J. 1 (1965); Inaugural Address of President John F. Kennedy, January 20, 1961, 107 Congressional Record, 1013.

[12] E.g. **Brown v. Board of Education,** 347 U.S. 483 (1954).

[13] E.g. Public Works and Economic Development Act of 1965, 42 U.S.C. §§3121-3226.

[14] E.g. State of the Union Address, President Lyndon B. Johnson, January 12, 1966, 112 Congressional Record 129.

[15] E.g. Operation LEAP (Leadership and Education for the Advancement of Phoenix), Ordinance No. S-3205, Dec. 15, 1964, City Council of Phoenix, Arizona, Implementing Resolution No. 11887, November 4, 1964.

[16] E.g. Hoover, **Annual Report of the Federal Bureau of Investigation, Fiscal Year 1965,** U.S. Department of Justice.

position of violence and suffering and depravation upon some individuals of our society by others, is misleading to say the least. Of this ilk, Miranda is a clear example.

Perhaps an eighth grade education, under a literal definition of the term and in the context of our affluent society, is a "poor education". Under no stretch of the imagination, however, can Miranda be deemed to be uneducated or illiterate. In addition to his formal schooling, petitioner had considerable and varied experiences which broadened his knowledge, particularly in the area which is of primary importance to us now.[17]

Counsel would have us believe that petitioner was incapable of producing the statement which was admitted against him (Appendix B. *infra*).[18] A simple reading and viewing of the statement refutes such a contention. The portion of the statement describing the actual events of the incident is in petitioner's hand and was written by him. Certainly the officers, if they were interested in putting words into Miranda's mouth, could have typed in these words also, in a favorable context, and simply obtained Miranda's signature to the whole. And although petitioner's grammar, sentence structure and punctuation leave much to be desired, the conclusion is inescapable that his knowledge and understanding of the difference between simple promiscuity and the crime of rape is more highly sophisticated than most of the Ph.Ds in our country.[19]

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[17] See n. 4, **supra**.

[18] Brief of Petitioner, n. 3.

[19] Note petitioner's careful use of the words "without force", "without force and with cooperation", "asked her to lay down, and she did". Appendix B, **infra**. See also petitioner's quoted sentence responses, statement of the case, **supra**, at 2.

Miranda is also labeled as "mentally abnormal". The basis for this is the psychiatric report (Appendix A, *infra*). While Miranda had an "emotional illness", it is questionable that this even made him "abnormal".[20] Clearly the diagnosis of the psychiatrist was to the effect that the illness was not disabling and that Miranda was able to understand the predicament he was in and knew the conduct society demanded of him at the time he chose to ignore those demands.[21]

B. THE POLICE

Admittedly there is no possible element of police brutality or coercion in this case, whether direct or subtle.[22] Yet petitioner, nevertheless, paints a picture of police disregard for rights guaranteed by our Constitution. The picture is inaccurate—but proving it so is almost a practical impossibility.

The articles, the studies, and the cases,[23] dealing, as they almost unanimously do, with the negative aspect of the problem, make it difficult to see the rule because of the emphasis on the exception. It is true that all

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[20] It has been estimated that at least 10% of our entire population have emotional illnesses of one type or another which should be treated professionally. Milt, **How to Deal With Mental Problems,** (National Association for Mental Health, Booklet, 1962).

[21] "It is my opinion that Mr. Mirande [sic] is aware of the charges that have been brought against him and is able to cooperate with his attorney in his own defense. Although Mr. Mirande [sic] has an emotional illness, I feel that at the time the acts were committed that he was aware of the nature and quality of the acts and that he was further aware that what he did was wrong." Appendix A, **infra.**

[22] Brief of Petitioner, at 10.

[23] E.g. LaFave, **Detention for Investigation by the Police: An Analysis of Current Practices,** 1962 Wash. U.L.Q. 331;

Smith, **Police Systems in the United States,** (2d rev.ed. 1960); **Ashcraft v. Tennessee,** 322 U.S. 143 (1944).

police officers are not interested in protecting the rights of the accused; it is true that there are convictions obtained by use of trumped-up evidence and wrongfully elicited incriminating statements and confessions; but these are the very few exceptions to the general rule. For every case of police insensitivity to individual rights, there are literally thousands of unreported incidents of the unstinting efforts of police and prosecutors which result in the extrication of an otherwise helpless and innocent victim, hopelessly intertwined in a web of circumstantial evidence of guilt.[24] The prime reason the vast majority of such instances go unreported and unstatisticized, is that the police and the prosecutor alike consider this just another important, but routine part of their work, which they do with the same dedication as they do the more spectacular phases.[25]

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[24] A person cannot talk to a police officer or prosecutor of many years tenure without hearing of numerous such incidents, many made possible by not only investigating extrinsic physical facts, but also by investigative questioning.

[25] The Law Enforcement Code of Ethics, as set forth in The Detroit Police Manual, and cited in Norris, **Constitutional Law Enforcement is effective Law Enforcement:** [Etc.], 43 U. Det. L. J. 203 (1965), n. 30, clearly reflects the importance of this particular responsibility, and represents the rule and not the exception:

"Law Enforcement Code of Ethics

As a Law Enforcement Officer, my fundamental duty is to serve mankind; to safeguard lives and property; to protect the innocent against deception, the weak against oppression or intimidation, and the peaceful against violence or disorder; and to respect the Constitutional rights of all men to liberty, equality and justice.

I will keep my private life unsullied as an example to all, maintain courageous calm in the face of danger, scorn or ridicule; develop self-restraint; and be constantly mindful of the welfare of others. Honest in thought and deed in both my personal and official life, I will be exemplary in obeying the laws of the land and the regulations of my department. Whatever I see or hear of a confidential nature or that is confided to me in my official capacity will be kept ever secret unless revelation is necessary in the performance of my duty.

I will never act officously or permit personal feelings, prejudices, animosities, or friendships to influence my decisions. With no com-

This Court, together with all the courts of our land, should and will continue to firmly and courageously deal with the exceptions to this rule. We must be careful, however, not to foreclose, limit or unduly hamper investigative techniques which, in their legitimate use, are not barred by any Constitutional mandate, solely because a few use the techniques to effect an unconstitutional result. The promulgation of such a rule of constitutional dimension in any given case would be as necessary as "Dr." Jerry Colona's recently suggested solution to Bob Hope's medical problem of a sore and infected big toe—to cut off Hope's head to relieve the execss weight on the toe.[26] While it goes without saying that the problem of the big toe would most certainly be forever solved, it is questionable whether the patient would be at all happy with the ancillary side effects of the treatment. As to whether a similarly undesirable side effect would be forthcoming from an unnecessarily broad constitutional rule in this case, we must look ahead.

C. THE NATURE OF THE CONTEST.

Petitioner, it seems, would have us interpret our adversary system of criminal justice as giving the ac-

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promise for crime and with relentless prosecution of criminals, I will enforce the law courteously and appropriately without fear or favor, malice or ill will, never employing unnecessary force or violence and never accepting gratuities.

I recognize the badge of my office as a symbol of public faith, and I accept it as a public trust to hold so long as I am true to the ethics of police service. I will constantly strive to achieve these objectives and ideals, dedicating myself before God to my chosen profession—Law Enforcement."

[26] Bob Hope Christmas Special, N.B.C. Television Network, January 26, 1966, 8:30 P.M., M.S.T.

cused a right to "win" the contest.[27] While it may be inherent in the very nature of our system, with its vital and essential safeguards to individual freedom, that a person who actually commits a criminal act may have extra opportunities to escape punishment for his crime, it must be clear without comment or citation that the intent of the Constitutional safeguards were to insure, as much as humanly possible, that the innocent and unpopular would not be wrongfully harassed, intimidated or convicted—not that the guilty should have any special chances for acquittal or other favorable result.

If the prosecuting authorities have gained an overwhelming advantage over a particular defendant, assuming they have done so by proper methods, and not by violating any of his constitutional rights, this is to be highly commended, not condemned. It is a vital attribute of our society that the law enforcement machinery apprehend, convict and punish and/or rehabilitate those who would break the laws and endanger, if not destroy, our domestic tranquility. Law enforcement is not a game of chance, *Massiah v. United States,* 377 U.S. 201, 213 (1964) (Dissenting Opinion); *McGuire v. United States,* 273 U.S. 95 (1927). There is no "gamesmanship" or "sportsmanship" involved here, at least insofar as the criminal is concerned. He follows no code of conduct or canons of ethics. The death, suffering, and depravation caused by crime is as real to those who are touched by its sting as is that of any war ever fought. Certainly the criminal gives no quarter; and none should be given in return except as is required to insure the integrity and continuation of the system which we all cherish.

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[27] Brief of Petitioner, at 9.

Criminals, like the rest of us, are inherently unequal. Some are skilled, some not; some intelligent, some not; some trained, some not; some blabbermouths, some not; some strong, some not; some cruel, some not, etc. It certainly would not be urged that if a criminal is foolish enough to leave physical clues, the police should not be allowed to use them because X, who committed the same crime, was more careful. Or if Y was callous enough, or "intelligent" enough, to kill his rape victim to prevent identification, certainly Z, who also raped, should not be given the same opportunity to kill so as to have an equal chance at the trial to "win". So, too, are there differences between what happened to Ernesto A. Miranda as contrasted with what happened to Danny Escobedo[28] which militate in favor of a different resolution of their problem by this Court.

III

MIRANDA WAS NOT DENIED HIS RIGHT TO COUNSEL AS GUARANTEED TO HIM BY THE SIXTH AND FOURTEENTH AMENDMENTS TO THE CONSTITUTION OF THE UNITED STATES.

The decision in this case must rest upon the scope and effect to be attributed to this Court's decision concerning right to counsel at the interrogation stage, in *Escobedo v. Illinois,* 378 U.S. 478 (1964). While petitioner's historical analysis is to be highly commended for the care and effort which it reflects, his almost cursory treatment of *Escobedo,* coupled as it is with an

[28] Escobedo v. Illinois, 378 U.S. 478 (1964).

inaccurate treatment of the Arizona Court's decision in the instant case, belies some doubt as to the absolute accuracy of the conclusion forecast as unassailable. Rather than obscuring the "simple lines of the situation",[29] the welter of the cases, the majority of which disagree with petitioner's conclusion,[30] coupled with the rather sharp divergence of opinion on this Court, not only in the recent decisions on this point, eg., *Massiah v. United States,* 377 U.S. 201 (1964) and *Escobedo v. Illinois, supra,* but in the earlier decisions as well, e.g., *Crooker v. California,* 357 U.S. 433 (1958) and *Cicenia v. LaGay,* 357 U.S. 504 (1958), indicate the problem posed here to be anything but simple.

A. THE ARIZONA COURT'S DECISION.

Petitioner, at least twice,[31] states that the Arizona Supreme Court rested its opinion on petitioner's refusal to request counsel. A reading of the opinion clearly reveals that this was only one factor in many which resulted in a determination that Miranda was not denied his right to counsel (Statement of the Case, *supra,* at 4). The nature and length of the questioning, the warning advice given, and the background of the petitioner were equally important factors. Petitioner is correct in stating that the Arizona Court's decision did not in any way purport to rest on a waiver doctrine.[32] This is made amply clear in the Arizona

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[29] Brief of Petitioner, at 28.

[30] For an exhaustive citation of the cases construing **Escobedo**, both on a State and Federal level, see: Sokol, **Brief of Amicus Curiae in The Escobedo Cases**, (The Michie Company, 1966).

[31] Brief of Petitioner, at 6, 30.

[32] Id, nn. 7 and 15.

of *Escobedo*, the Court specifically approves the rejection of the absolute rule sought by *Crooker*:

> "That 'every state denial of a request to contact counsel [is] an infringement of the constitutional right *without regard to the circumstances of the case*'." *Id*, at 491. (Emphasis in *Crooker*).

The continued rejection of the absolute rule sought by *Crooker*, implying as it does that in some cases a state could even deny a request without denying an accused his constitutional right to counsel, clearly rejects, *a fortiori*, the absolute rule sought by petitioner.

This result is also pointed to by the inclusion and emphasis of the request for counsel as a vital factor in *Escobedo* while not even including a reference to this Court's recent reemphasis of the unimportance of a request for counsel in the implementation of the absolute right to be provided counsel in *Carnley v. Cochran, supra*, 369 U.S. 506. The ommission of reference to *Carnley* must be considered to have been by design and not accident. Thus the scope of the rule, and the force of its emphasis, must be and is different.

The decision in *Escobedo* announces an exclusionary rule directed against the affirmative conduct of police and prosecutors calculated to deny to an accused his right to counsel. Any incriminating statements received thereafter, regardless of the fact that they are clearly the product of the free and uncoerced will of the accused, are inadmissible, *Escobedo v. Illinois, supra*, 378 U.S. at 491. The decision in *Massiah v. United States, supra*, 377 U. S. 201, although involving a fed-

eral prosecution, certainly reinforces this view of the *Escobedo* doctrine, particularly the last two paragraphs thereof.[37]

The rule announced is a parallel to that announced in *Mapp v. Ohio,* 367 U.S. 643 (1961), designed as a specific deterrent to police activity calculated to render meaningless the citizen's rights under the search and seizure provision of the Fourth Amendment to the Federal Constitution. It must also be applied with the same practical, non-technical, common sense approach as is the *Mapp* exclusionary rule. *United States v. Ventresca,* 380 U.S. 102 (1965).

A contrary application would result in attempting to make police officers part-time defense counsel and part-time magistrates, or deprive them completely of an investigative technique which, in its proper use and

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[37] "The Solicitor General, in his brief and oral argument, has strenuously contended that the federal law enforcement agents had the right, if not indeed the duty, to continue their investigation of the petitioner and his alleged criminal associates even though the petitioner had been indicted. He points out that the Government was continuing its investigation in order to uncover not only the source of narcotics found on the S.S. Santa Maria, but also their intended buyer. He says that the quantity of narcotics involved was such as to suggest that the petitioner was part of a large and well-organized ring, and indeed that the continuing investigation confirmed this suspicion, since it resulted in criminal charges against many defendants. Under these circumstances the Solicitor General concludes that the government agents were completely 'justified in making use of Colson's cooperation by having Colson continue his normal associations and by surveilling them.'

"We may accept and, at least for present purposes, completely approve all that this argument implies, Fourth Amendment problems to one side. We do not question that in this case, as in many cases, it was entirely proper to continue an investigation of the suspected criminal activities of the defendant and his alleged confederates, even though the defendant had already been indicted. All that we hold is that the defendant's own incriminating statements, obtained by federal agents under the circumstances here disclosed, could not constitutionally be used by the prosecution as evidence against **him** at his trial." **Massiah v. United States,** 377 U.S. at pages 206 and 207. (Emphasis in original).

application, is as invaluable as any modern, scientific tool for the detection and prevention of crime.

The legal scholars and commentators have produced volumes of material on *Escobedo.*[38] It ranges the complete spectrum, from law professors and lawyers[39] to second and third year law students.[40] Both poles of the controversy are forcefully presented, including extensive citations to both primary and secondary authority, in the very recent publication of the University Press of Virginia: Kamisar, Inbau, and Arnold, *Criminal Justice in Our Time,* (Magna Carta Essays, Howard ed. 1965).

Ultimately, however, neither the overwhelming weight of the writings of the commentators, nor the weight of the decisions of the Judges and Justices of the other appellate tribunals of our land, whether state or federal, can dictate or necessarily foreshadow this Court's determination of the scope and effect of the principles announced in *Escobedo.*

If the rule sought by petitioner is forthcoming, we can only re-echo the ominous warnings and misgivings of the dissenters in *Massiah* and *Escobedo, supra.* Miranda and Escobedo are not equal and there is no Con-

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[38] For an exhaustive collection of citations see: Sokol, **Brief of Amicus Curiae in the Escobedo Cases, supra,** n. 29.

[39] E.g. Sutherland, **Crime and Confession,** 79 Harv. L. Rev. 21 (1965); Dowling, **Escobedo and Beyond,** 56 J. Crim. L., C.&P.S., 143 (1965); Herman, **The Supreme Court and Restrictions on Police Interrogation,** 25 Ohio St. L.J. 449 (1964).

[40] E.g. Comment, **Escobedo v. Illinois,** 25 Md. L. Rev. 165 (1965); Comment, **Right to Counsel During Police Interrogation, The Aftermath of Escobedo,** 53 Calif. L. Rev. 337 (1965); Note, **Escobedo in the courts, May Anything You Say Be Held Against You,** 19 Rutgers L. Rev. 111 (1964).

stitutional reason for this Court to equate them in the manner sought by petitioner, any more than there would be for this Court to balance their skill in committing and concealing their crime. No amount of scientific advancements in crime detection will produce evidence which a clever criminal has not been foolish enough to provide for discovery. If a criminal has been clever in the commission of his crime, but is foolish or careless in his handling of the police interrogation of him concerning that crime, the evidence obtained as a result of the only honest investigative avenue left open to the law enforcement agency, should not be suppressed unless that evidence is determined not to be the product of the free and uncoerced will of the accused, or if it is obtained after the police have undertaken a course of conduct calculated to deny the accused his right to counsel. Certainly nothing less will be tolerated, but the United States Constitution requires no more.

CONCLUSION

Quite appropriately, Justice Goldberg, who authored *Escobedo v. Illinois, supra,* provides the words most appropriate to conclude this brief. Speaking for the Court in *United States v. Ventresca, supra,* 380 U.S. 102, he said:

> "This court is alert to invalidate unconstitutional searches and seizures whether with or without a warrant. [Presumably, for purposes of this case, confessions and admissions may be substituted for the final phrase concerning searches and seizures] [Citations omitted.] By doing so, it vindicates individual liberties and strengthens the administration of justice by promoting respect for law and order. This court is equally concerned to uphold the actions of law enforcement officers consistently following the proper constitutional course. This is no less important to the administration of justice than the invalidation of convictions because of disregard of individual rights or official overreaching. In our view the officers in this case did what the Constitution requires.
>
> * * *
>
> *"It is vital that having done so their actions should be sustained under a system of justice responsive both to the needs of individual liberty and to the rights of the community." Id,* at 111 and 112. (Emphasis added).

The officers in this case also acted within the constitutional standards, and it is equally vital that their actions be sustained.

The judgment and decision of the Arizona Supreme Court in this case below should be affirmed.

Respectfully submitted,

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February, 1966

APPENDIX A

JAMES M. KILGORE, JR., M.D.
Suite 209
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PSYCHIATRY

May 28, 1963

Honorable Warren L. McCarthy
Judge of the Superior Court
Maricopa County
Court House
Phoenix, Arizona

MIRANDE, Ernest Arthur
Criminal Cause #41947, #41948

Ernest Arthur Mirande is a 23-year-old Mexican male who was examined by me in the County Jail on May 26, 1963.

Mr. Mirande is charged with the offense of robbery in relation to one Barbara Sue McDaniel on November 27, 1962. Mr. Mirande states that on that evening approximately 9:30 p.m. he saw a lady go to her car in the parking lot alone. He approached the car and got in the front seat. He stated at the time that he didn't know whether he would rob or rape the lady. She asked him if he didn't want to go to her apartment. Mr. Mirande stated that this frightened him in that she was so eager for sex and decided at that point to ask for money which she readily gave to him. He then said, "Don't worry. If I had wanted to rape you, I would have done it before."

cooperation. Asked her to lay down and she did could not get penis into vagina got about ½ (half) inch in. Told her to get clothes back on. Drove her home. I couldn't say I was sorry for what I had done. But asked her to say a prayer for me. E.A.M.

I have read and understand the foregoing statement and hereby swear to its truthfulness.

/s/ Ernest A. Miranda

WITNESS /s/ Carroll Cooley

Wilfred M. Young #182

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Supreme Court of the United States

October Term, 1965.

PEOPLE OF THE STATE OF CALIFORNIA, Petitioner,
No. 584. *v.*
ROY ALLEN STEWART, Respondent.
On Writ of Certiorari to the Supreme Court of the State of California.

ERNEST ARTHUR MIRANDA, Petitioner,
No. 759. *v.*
THE STATE OF ARIZONA, Respondent.
On Writ of Certiorari to the Supreme Court of the State of Arizona.

MICHAEL VIGNERA, Petitioner,
No. 760. *v.*
PEOPLE OF THE STATE OF NEW YORK, Respondent.
On Writ of Certiorari to the Court of Appeals of the State of New York.

CARL CALVIN WESTOVER, Petitioner,
No. 761. *v.*
UINTED STATES OF AMERICA, Respondent.
On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.

SYLVESTER JOHNSON and STANLEY CASSIDY, Petitioners,
No. 762. *v.*
STATE OF NEW JERSEY, Respondent.
On Writ of Certiorari to the Supreme Court of the State of New Jersey.

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INTEREST OF AMICUS.

The American Civil Liberties Union has engaged solely in the defense of the Bill of Rights for more than forty-five years. Much of its energies have been directed toward effectuating the provisions of the Bill of Rights concerned with the administration of criminal justice.

Effectuation of a man's right not to be compelled to incriminate himself is essential to the preservation of our accusatorial system of criminal justice. The American Civil Liberties Union believes that such effectuation can be achieved by proper application of this Court's decision in *Escobedo v. Illinois*, 378 U. S. 478 (1965). This is just the issue presented in these cases. The briefs for the parties have directed attention to the particular facts of each case. Your Amicus believes it can best serve the Court by presenting a more general argument addressed to the theory and application of *Escobedo*.[1]

1. The attorneys for the parties involved have consented to the filing of this brief. The letters of consent are on file with the Clerk.

SUMMARY OF ARGUMENT.

In *Escobedo v. Illinois,* 378 U. S. 478 (1965), this Court held that the privilege against self-incrimination was violated when an accused's confession was obtained through police in-custody interrogation designed to elicit incriminating statements from him at a time when he was denied the presence of counsel, since the presence of counsel was necessary to protect the constitutional privilege. In so holding, the Court reached the natural culmination of its "involuntary" confession decisions, in light of its application of the privilege against self-incrimination to the States. The determination that *Escobedo* rests upon effective enforcement of the privilege against self-incrimination is not of mere academic interest, but vitally affects the proper application of the decision.

There can be no doubt that police custodial interrogation designed to elicit a confession is inherently violative of the privilege against self-incrimination. Therefore confessions obtained under such circumstances cannot be constitutionally admitted in State or federal criminal proceedings unless it has been shown that adequate safeguards were present to protect the privilege. For reasons spelled out at length in the brief, under the present circumstances of police custodial interrogation designed to elicit a confession, the required safeguard is the presence of counsel.

A police warning of the subject's right to remain silent is not adequate. Neither is the granting of prior access to counsel, as distinguished from the presence of counsel. For these reasons it is immaterial that a subject of police custodial interrogation asked for or was able to obtain retained counsel. Effectuation of the privilege against self-incrimination, in these circumstances, requires the providing of counsel to all.

This does not mean that the effectuation of the privilege requires the presence of counsel in other than police

custodial interrogation designed to elicit a confession. Nor does it mean that if other protective devices are devised and put into effect which effectively secure the privilege even in the police custodial situation, the presence of counsel would still be required. A holding that, under the conditions of police interrogation as they normally exist today, the presence of counsel is necessary to protect the privilege against self-incrimination, should not foreclose a determination that other protective devices are acceptable when and if such devices are put into effective use.

Finally, the Court must reject the argument that the privilege against self-incrimination should not be enforced in the face of a police "need" for its non-enforcement. Even if such "need" conflicting with the privilege were shown to exist, the Constitution requires that the conflict be resolved in favor of effective enforcement of the constitutional privilege. However, this issue need not be reached as the asserted police "need" has not been shown to exist and the burden of production of evidence clearly rests on the prosecution. Not only have prosecutors not produced any convincing evidence, the assertions which they make are not even supported by considered legislative determinations of police need. Thus in a scale which opposes unsupported assertions of necessity by police and prosecutors on the one side, and effectuation of the individual's constitutional right not to be compelled to incriminate himself on the other, the balance must be struck on the side of the constitutional right.

ARGUMENT.

I.

Escobedo v. Illinois Held That the Privilege Against Self-Incrimination Was Violated by Obtaining a Man's Confession Through Police Interrogation Designed to Elicit Incriminating Statements at a Time When He Was in Custody and Was Denied the Presence of Counsel, Since Counsel Was Necessary to Dispel the Inherently Compelling Atmosphere of Such Interrogation.

A. The Facts and Setting of *Escobedo*.

The *Escobedo* opinion itself placed great emphasis on the facts of the case, and it is appropriate that the analysis of the implications of that decision begin with an examination of these facts. Danny Escobedo, a 22-year-old, of Mexican extraction, with no record of previous experience with the police, was arrested and taken handcuffed to police headquarters for interrogation in connection with the fatal shooting of his brother-in-law. Throughout the entire interrogation, Escobedo was repeatedly told that the police had convincing evidence that he had fired the fatal shots. During the interrogation he was cut off from all contact with the outside world despite his repeated requests to see his retained attorney, who was at the police station attempting to see him. Requests of both Escobedo and his attorney to see each other were continually denied by the police. At one point, Escobedo and his attorney came into each other's view for a few moments but the attorney was quickly ushered away. Escobedo overheard a detective telling his attorney that he could see Escobedo when they were finished interrogating him. During the entire interrogation Escobedo "was handcuffed" in a standing position, he "was nervous, he had circles under his eyes and

he was upset" and he was "agitated" because "he had not slept well in over a week."

Despite all this, Escobedo did not "crack" until confronted with an alleged accomplice who stated that Escobedo had fired the fatal shots. To this Escobedo replied that he hadn't shot the deceased, the accomplice had. In this way, Escobedo, for the first time, admitted to some knowledge of the crime. After that "crack", he made additional statements implicating himself in the murder plot. At this point an Assistant State's Attorney was summoned "to take" his statement. He was an experienced lawyer who was assigned to the homicide division to take "statements" from prisoners in custody and who "took" Escobedo's statement by asking carefully framed questions. Neither at this time nor at any other point in the interrogation had anyone warned Escobedo of his constitutional right not to be compelled to incriminate himself.

B. The Rationale of *Escobedo:* Effectuation of the Right Not to Be Compelled to Incriminate Oneself.

On these facts, this Court held that during his interrogation Escobedo had been denied "the Assistance of Counsel" in violation of the Sixth Amendment to the Constitution as made obligatory upon the States by the Fourteenth Amendment, and thus the incriminatory statement elicited during this interrogation could not be used against him at his criminal trial.

In holding that Escobedo had been denied his Sixth Amendment right to counsel the Court relied on the facts that he had been extensively interrogated where the "purpose of the interogation was to 'get him' to confess his guilt despite his constitutional right not to do so. At the time of his arrest and throughout the course of the interrogation, the police told [Escobedo] that they had convincing evidence that he had fired the fatal shots. Without informing him of his absolute right to remain silent in the

face of this accusation, the police urged him to make a statement." 378 U. S., at 485.

The facts of the case were, therefore, remarkably similar to these involved in *Bram v. United States,* 168 U. S. 532 (1897), where almost seventy years ago this Court held that such an incriminating statement had been elicited in violation of the suspect's Fifth Amendment right not to be compelled to incriminate himself. Indeed, the Court in *Escobedo,* 378 U. S., at 485-486, relied on and quoted the following language of *Bram:*

> "It cannot be doubted that, placed in the position in which the accused was when the statement was made to him that the other suspected person had charged him with crime, the result was to produce upon his mind the fear that if he remained silent it would be considered an admission of guilt, and therefore render certain his being committed for trial as the guilty person, and it cannot be conceived that the converse impression would not also have naturally arisen, that by denying there was hope of removing the suspicion from himself." *Bram v. United States,* 168 U. S. 532, 562.

In discussing the significance of counsel during police interrogation of a suspect in custody, and the possible effect of counsel's presence on the alleged police "need" to obtain confessions, the Court stated: "Our Constitution, unlike some others, strikes the balance in favor of the right of the accused to be advised by his lawyer of his privilege against self-incrimination." 378 U. S., at 488.

The Court went on to point out that "[w]e have learned the lesson of history, ancient and modern, that a system of criminal law enforcement which comes to depend on the 'confession' will, in the long run, be less reliable and more subject to abuses than a system which depends on extrinsic evidence independently secured through skillful investigation. As Dean Wigmore so wisely said:

> '*[A]ny system of administration which permits the prosecution to trust habitually to compulsory self-*

> ***disclosure as a source of proof must itself suffer morally thereby.*** The inclination develops to rely mainly upon such evidence, and to be satisfied with an incomplete investigation of the other sources. The exercise of the power to extract answers begets a forgetfulness of the just limitations of that power. The simple and peaceful process of questioning breeds a readiness to resort to bullying and to physical force and torture. If there is a right to an answer, there soon seems to be a right to the expected answer,—that is, to a confession of guilt. Thus the legitimate use grows into the unjust abuse; ultimately, the innocent are jeopardized by the encroachments of a bad system. Such seems to have been the course of experience in those legal systems where the privilege was not recognized.' 8 Wigmore, Evidence (3d ed. 1940), 309. (Emphasis in original.)" 378 U. S., at 488-89.

It thus seems clear that the Court held that Escobedo had been denied his right to the Assistance of Counsel because, under the circumstances of that case, providing counsel to Escobedo was necessary to protect effectively his basic right not to be compelled to incriminate himself. The fundamental quality of the privilege against self-incrimination is emphasized by considering the independent significance of the two rights. The privilege against self-incrimination is so central to our system of justice, that it is hard to conceive of our society without it; yet, it would seem fair to say that if there were no such privilege, *Escobedo* might well have come to a different result.[2] On

2. Put on a straight right to counsel approach, *cf., Massiah v. United States*, 377 U. S. 201 (1964), it might well be doubtful that police interrogation would constitute a "critical stage" absent the self-incrimination privilege. *Cf. White v. Maryland*, 373 U. S. 59 (1963); *Hamilton v. Alabama*, 368 U. S. 52 (1961). While it might be argued that, even absent the privilege against self-incrimination, *Escobedo* could still have been put on "involuntary" confession grounds, *cf. Haynes v. Washington*, 373 U. S. 503 (1963), it again seems doubtful that, absent the privilege, the "involuntary" confession cases would have proceeded to the point expressed in *Haynes*. See *Malloy v. Hogan*, 378 U. S. 1, 7 (1964).

the other hand, it seems clear that the absence of a right to counsel should have had no effect on the result; in the circumstances of *Escobedo*, the privilege against self-incrimination required the presence of counsel for its effectuation.

Such a marriage of the Fifth Amendment privilege and Sixth Amendment right to counsel (as made applicable by the Fourteenth Amendment) is not unique to *Escobedo*. The Court has often recognized the fact that the Assistance of Counsel is necessary to protect effectively other constitutional rights. For example, in *Ferguson v. Georgia*, 365 U. S. 570 (1961), the Court held that a defendant was denied the effective assistance of counsel when counsel was necessary in order to enforce effectively his right to testify on his own behalf. Similarly, in *Townsend v. Burke*, 334 U. S. 736 (1948), this Court held that a defendant had been denied the effective assistance of counsel at sentencing when the presence of counsel was necessary to protect him against the possibility that the prosecution had purposefully submitted misinformation to the sentencing judge. Of particular relevance to the problem of *Escobedo* is the long series of "involuntary" confession cases in which the Court has stressed the fact that the suspect did not have the assistance of counsel during the interrogation. See, e.g., *Chambers v. Florida*, 309 U. S. 227 (1940); *Ashcraft v. Tennessee*, 322 U. S. 143 (1944); *Haley v. Ohio*, 332 U. S. 596 (1948); *Fikes v. Alabama*, 352 U. S. 191 (1957); *Spano v. New York*, 360 U. S. 315 (1959); *Culombe v. Connecticut*, 367 U. S. 568 (1961); *Gallegos v. Colorado*, 370 U. S. 49 (1962); *Haynes v. Washington*, 373 U. S. 503 (1963).

And, just this past Term, the Court merged a defendant's right to counsel with his right to be confronted with the witnesses against him. In *Pointer v. Texas*, 380 U. S. 400 (1965), the Court held that the use at trial of a transcript of a witness's testimony taken at a preliminary hearing at which the defendant did not have counsel violated the petitioner's right to confrontation because the

statement of the witness used "against petitioner at his trial had not been taken at a time and under circumstances affording petitioner through counsel an adequate opportunity to cross-examine" the witness. 380 U. S., at 407.

Similarly, the use of his confession against Escobedo at his trial violated his constitutional rights since it was taken at a time and under circumstances where the lack of the effective assistance of counsel rendered completely nugatory his right not to be compelled to incriminate himself.[3]

The difference between this approach to *Escobedo* and one that concentrates solely on an isolated right to counsel is not only of academic interest; it vitally concerns the proper application of the decision. The view that concentrates on the right to counsel necessarily is directed to an inquiry as to when such right attaches. One way of approaching this is to attempt to discover a point in time or stage in the process for such attachment. Before that point is reached *Escobedo* has no application; after it is reached, *Escobedo* requires counsel. It is submitted that such an all or nothing approach may go both too far and not far enough. A rigid requirement of providing counsel under any and all circumstances after the crucial point in time is reached, may require the provision of counsel under circumstances where counsel is not necessary to the effectuation of a person's right not to be compelled to incrimi-

3. This, of course, does not mean that the Sixth Amendment right to counsel has no operative effect other than to enforce effectively other constitutional rights. It is clear that the Sixth Amendment does have independent operative effects both at trial, see *Gideon v. Wainwright*, 372 U. S. 335 (1963), and before trial, see *White v. Maryland*, 373 U. S. 59 (1963); *Hamilton v. Alabama*, 368 U. S. 52 (1961); *Massiah v. United States*, 377 U. S. 201 (1964); *McLeod v. Ohio*, 381 U. S. 356 (1965). It is submitted, however, that, in light of the analysis contained in this brief, it is not now necessary to determine the extent of this independent right to counsel beyond the situations represented by the above cases. *Cf. In re Newbern*, 55 Cal. 2d 508, 11 Cal. Rptr. 551, 360 P. 2d 47 (1961); *Winston v. Commonwealth*, 188 Va. 386, 49 S. E. 2d 611 (1948).

nate himself. Moreover, it might stifle desirable reform in State law or police practices aimed at the possibility of effectuating this right through means other than providing counsel. On the other hand the counsel-or-nothing approach may result in not providing adequate protection when it is found that the point in time at which the right to counsel attaches has not been reached, although the danger of compelled self-incrimination looms large. Indeed, the knowledge that counsel must be provided if this crucial point in time is found to have been reached may make courts reluctant to make such a finding when the assistance of counsel does not seem to be a feasible requirement. Yet, these may very well be cases where the effectuation of a person's right not to be compelled to incriminate himself requires protection, though protection other than through the assistance of counsel.[4]

Another possible counsel theory of *Escobedo* is an approach that makes the providing of counsel dependent upon the circumstances of the interrogation. If this view is taken, however, the issue then really becomes the effectuation, during the interrogation, of the Fifth Amendment right. This is just the approach advocated in this brief.

If, therefore, *Escobedo* rests upon effectuation of a person's right not to be compelled to incriminate himself, resolution of the issues here presented concerning its application require an analysis of this right and how it must be effectuated in the context of police investigation. We, therefore, turn to these issues.

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4. *Massiah v. United States,* 377 U. S. 201 (1964) apparently holds that indictment is an absolute point at which the right to counsel attaches. *Cf. McLeod v. Ohio,* 381 U. S. 356 (1965). The selection of indictment as an absolute point is, however, supportable on the basis of the theory of an indictment: that the government has prior to that time completed its investigation and made its basic case. Moreover, the accused's need for trial preparation—and the assistance of counsel therein—has then become established.

This "air of confidence" is to be used along with patience and persistence. p. 108. "Not only must the interrogator have patience, but he must also display it. It is well, therefore, to get the idea across, in most case situations that the interrogator has 'all the time in the world.'" p. 109.

O'HARA, after setting forth various "stratagems" to compel incriminating statements makes the following recommendation of "perseverance":

> "In the preceding paragraphs emphasis has been placed on kindness and stratagems. The investigator will, however, encounter many situations where the sheer weight of his personality will be the deciding factor. Where emotional appeals and tricks are employed to no avail, he must rely on an oppressive atmosphere of dogged persistence. He must interrogate steadily and without a relent, leaving the subject no prospect of surcease. He must dominate his subject and overwhelm him with his inexorable will to obtain the truth. He should interrogate for a spell of several hours pausing only for the subject's necessities in acknowledgment of the need to avoid a charge of duress that can be technically substantiated. In a serious case, the interrogation may continue for days, with the required intervals for food and sleep, but with no respite from the atmosphere of domination. It is possible in this way to induce the subject to talk without resorting to duress or coercion. This method should be used only when the guilt of the subject appears highly probable." p. 12.

Can there be any doubt that under such circumstances many "subjects" of police interrogation will assume that the police have a right to an answer, and, indeed, to what the police regard as the "correct" answer—a confession of guilt? *Cf.* 8 WIGMORE, EVIDENCE 309 (3rd ed. 1940); DEVLIN, THE CRIMINAL PROSECUTION IN ENGLAND 26-27 (1960): "It is probable that even today, when there is much less

ignorance about these matters than formerly, there is still a general belief that you must answer all questions put to you by a policeman, *or at least that it will be the worse for you if you do not.*" (Emphasis added.) The whole purpose of such interrogation is to produce in the subject "the fear that if he remained silent it would be considered an admission of guilt", *Bram v. United States,* 168 U. S. 532, 562 (1897), or indeed, that it might otherwise be "worse" for him.

INBAU & REID, pp. 111-112, recommends an "effective way to deal with a subject" who, despite all other pressures, has the knowledge of and the gall to insist upon his right not to be compelled to incriminate himself or asks to see a relative, friend or attorney:

> "IF A SUBJECT REFUSES TO DISCUSS THE MATTER UNDER INVESTIGATION, CONCEDE HIM THE RIGHT TO REMAIN SILENT, AND THEN PROCEED TO POINT OUT THE INCRIMINATING SIGNIFICANCE OF HIS REFUSAL.
>
> "The most effective way to deal with a subject who refuses to discuss the matter under investigation is to concede to him the right to remain silent. This usually has a very undermining effect. First of all, his is disappointed in his expectation of an unfavorable reaction on the part of the interrogator. Secondly, a concession of this right to remain silent impresses the subject with the apparent fairness of his interrogator.
>
> "After this psychological conditioning, the interrogator should then proceed to point out to the subject the incriminating significance of his refusal to talk. The following comments have been found to be very effective: 'Joe, you have a right to remain silent. That's your privilege and I'm the last person in the world who'll try to take it away from you. If that's the way you want to leave this, O. K. But let me ask you this.

Suppose you were in my shoes and I were in yours and you called me in to ask me about this and I told you, "I don't want to answer any of your questions." You'd think I had something to hide, and you'd probably be right in thinking that. That's exactly what I'll have to think about you and so will everybody else. So let's sit here and talk this whole thing over.'

"After the subject has been talked to in this manner, the interrogator should then immediately ask the subject some innocuous questions that have no bearing whatsoever on the matter under investigation. For instance, the interrogator may inquire of the subject, 'How long have you lived in this city?'; 'Where are you working?'; 'How long have you worked there?'. As a rule the subject will answer such questions, and then gradually the examiner may start in with questions pertaining to the offense under investigation. Except for the career criminal, there are very few persons who will persist in their initial refusal to talk after the interrogator has handled the situation in this suggested manner.

"If a subject expresses a desire to talk to a relative, or to an employer, or to any other person, the interrogator should respond by suggesting that the subject first tell the truth to the interrogator himself rather than get anyone else involved in the matter. If the request is for an attorney, the interrogator may suggest that the subject save himself or his family the expense of any such professional service, particularly if he is innocent of the offense under investigation. The interrogator may also add, 'Joe, I'm only looking for the truth, and if you're telling the truth, that's it. You can handle this by yourself.' "

Is there any doubt that a statement produced under such circumstances results from undermining the "subject's" right "to remain silent unless he chooses to speak

in the unfettered exercise of his own will"? *Malloy v. Hogan, supra,* at 8.

Can it be seriously asserted that the extracting of confessions under such circumstances conforms to our accusatorial system under which "society carries the burden of proving its charge against the accused not out of his own mouth . . . [and] must establish its case, not by interrogation of the accused even under judicial safeguards, but by evidence independently secured through skillful investigation." *Watts v. Indiana,* 338 U. S. 49, 54 (1949) (opinion of Frankfurter, J.). Where there has been a confession elicited through misapprehension, fear, trick or stratagem has there not been a violation of the basis of our system that "[t]he law will not suffer a prisoner to be made the deluded instrument of his own conviction." 2 Hawkins, Pleas of the Crown, c. 64 § 34 (8th ed. 1924). Indeed, such police interrogation has been aptly characterized as the worst of both worlds: "It is the inquisitorial system without its safeguards." *Watts v. Indiana, supra,* at 55 (opinion of Frankfurter, J.).

The absurdity of calling a confession "voluntary" when produced by typical police custodial interrogation designed to elicit a confession has been pointed up by an apt example in Professor Sutherland's recent article, Crime and Confession, 79 HARV. L. REV. 21, 37 (1965):

> "Suppose a well-to-do testatrix says she intends to will her property to Elizabeth. John and James want her to bequeath it to them instead. They capture the testatrix, put her in a carefully designed room, out of touch with everyone but themselves and their convenient 'witnesses', keep her secluded there for hours while they make insistent demands, weary her with contradictions and finally induce her to execute the will in their favor. Assume that John and James are deeply and correctly convinced that Elizabeth is unworthy and will make base use of the property if she gets her hands on it, whereas John and James have

the noblest and most righteous intentions. Would any judge of probate accept the will so procured as the 'voluntary' act of the testatrix?"

E. *Escobedo* Was Not Revolutionary, But Rather the Natural Culmination of a Series of Cases.

It was within this context of police custodial interrogation aimed at eliciting a confession that the Court in *Escobedo* held that denying Escobedo the presence of counsel during the interrogation resulted in the confession being obtained in violation of his right not to be compelled to incriminate himself. Despite the furor raised in some corners about the revolutionary nature of this decision, it is submitted that the decision was not revolutionary, but rather the natural culmination of a series of cases.

As noted above, beginning with *Lisenba v. California,* 314 U. S. 219 (1941), there was started a shift to the testing of State confessions by Fifth Amendment standards. This development culminated, in one of its phases, in the holding of *Malloy* that the Fifth Amendment right not to be compelled to incriminate oneself was applicable in toto to the States through the Fourteenth Amendment.

Alongside this development was the recognition by the Court in numerous "involuntary" confession cases that the fact that a suspect was held incommunicado, and, in particular, that he was not given access to an attorney during the interrogation period was highly significant in the determination of whether or not a confession was "voluntary." See, e.g., *Chambers v. Florida,* 309 U. S. 227 (1940); *Ashcraft v. Tennessee,* 322 U. S. 143 (1944); *Haley v. Ohio,* 332 U. S. 596 (1948); *Fikes v. Alabama,* 352 U. S. 191 (1957); *Spano v. New York,* 360 U. S. 315 (1959); *Culombe v. Connecticut,* 367 U. S. 568 (1961); *Gallegos v. Colorado,* 370 U. S. 49 (1962); *Haynes v. Washington,* 373 U. S. 503 (1963).

In this last case—which has been described by the Court as one in which there was "held inadmissible even a confession secured by so mild a whip as the refusal, under

certain circumstances, to allow a suspect to call his wife until he confessed," *Malloy v. Hogan, supra,* at 7 (1964)—the Court relied heavily upon the facts that Haynes was held incommunicado, at no time was warned of his right to remain silent or that his answers might be used against him nor told of his rights respecting consultation with an attorney. The step from *Haynes* to *Escobedo* is an extremely short one, if, indeed, one at all. If *Haynes* represents the capstone of the "involuntary" confession cases, then *Escobedo* represents the application of this capstone in light of the full Fifth Amendment protection held to be applicable to State interrogation by *Malloy.*

F. The Inherently Compelling Nature of Police Custodial Interrogation Requires That a Confession Obtained During Such Interrogation Be Excluded Unless the State Shows That There Were Present Adequate Devices to Protect the Subject's Privilege Against Self-Incrimination.

As the above analysis shows, usual police custodial interrogation designed to elicit a confession is inherently violative of the subject's right not to be compelled to incriminate himself. It is obviously impossible to probe the mind of the subject of this interrogation to determine whether in fact these compelling circumstances were the causative force behind his making the self-incriminating statements. Recognizing this fact, this Court has never adopted such a self-defeating inquiry but has tested the issue of compulsion as against the possibility of compulsion inherent in the external situation. *Cf. Ashcraft v. Tennessee,* 322 U. S. 143, 154 (1944). When the external police created situation is such to be inherently prejudicial to the subject's privilege against self-incrimination, a Court does not, and can not "stop to determine whether prejudice resulted." *Hamilton v. Alabama,* 368 U. S. 52, 55 (1961).[6]

6. On this point, the same result should be reached on a Sixth Amendment approach as there the issue is also one of possible, not actual prejudice. See *Hamilton v. Alabama,* 368 U. S. 52 (1961).

It is particularly apt that the focus of a self-incrimination issue be on the external conditions established by government. As this Court has recognized, a major basis for the privilege was our rejection of the inquisitorial *system*, the Star-Chamber *process*. See, e.g. *Murphy v. Waterfront Commission*, 378 U. S. 52, 55 (1964). Thus, concentration on the *system* or *process* of police interrogation is not only appropriate but necessary if we are to maintain fidelity to one of the major purposes of the privilege.

It is within this concept of analyzing the police process that we have reviewed the process of police custodial interrogation designed to elicit a confession and shown that this process is typically violative of the subject's privilege against self-incrimination.

G. Under the Present Circumstances of Police Custodial Interrogation Designed to Elicit a Confession, the Presence of Counsel Is Required to Protect the Subject's Privilege Against Self-Incrimination.

The issue now is what protective devices need be added to this police custodial interrogation to make the process conform to Fifth Amendment requirements, i.e., to dispel the government established compelling atmosphere. *Escobedo*, consistent with previous precedent, held that, under the present conditions of police custodial interrogation, the presence of counsel was this necessary protective device. The protection of the Fifth Amendment privilege afforded by the presence of counsel in police custodial interrogation designed to elicit a confession has been spelled out in the other briefs in this case, is well known to this Court, and therefore, can be here quickly summarized. These include giving an effective warning of the suspect's privilege "to remain silent unless he chooses to speak in the unfettered exercise of his will"; providing someone in whom the subject can confide and who is a contact between the subject and the outside world; assuring that if the subject chooses

to tell his story, he does so in a way that conveys his intended meaning; and providing an outside observer to the interrogation proceedings.

Obviously an effective warning of the privilege is a keystone of its effective enforcement. It is equally clear that there is a need to provide the presence of someone at interrogation in whom the subject can confide and who will bolster his confidence. As discussed above, it is a prime function of police custodial incommunicado interrogation to tear a subject away from all things in which he can rely for support and place him in complete subservience to the interrogator. The aim is to have him dominated by the interrogator. In order to dispel such circumstances, therefore, it is manifestly necessary that the incommunicado environment be eliminated. The presence of counsel will tend to accomplish this aim. Not only is counsel a person outside the police force, he is one who can meet the accomplished police interrogator on a level of at least partial equality. By training and experience he should not be afraid to stand up to unrestrained governmental power. He is someone in whom the subject can freely confide. It is his job to be a whole-hearted advocate for the subject with no conflicting interests in this regard.

In order to make effective the privilege against self-incrimination it is also necessary to ensure that if a person desires to tell his story he is allowed to do so in a way that conveys his intended meaning. A police interrogator, however, is basically an accomplished cross-examiner who is trained to allude to a particular piece of incriminating evidence but then to "be on guard to shut off immediately any explanation the subject may start to offer at that time." Inbau & Reid, p. 27. Counsel present will tend to ensure that the accused has a real opportunity, if he so desires, to tell his story effectively and to eliminate distortions and ambiguities. In short, counsel can aid in examining the accused so that his story comes out as he aims to tell it as well as protecting him from unrestrained cross-examination. This Court has recognized the need

for "the guiding hand of" counsel to so aid an accused at trial where "[t]he tensions . . . for an accused with life or liberty at stake might alone render him utterly unfit to give his explanation properly and completely." *Ferguson v. Georgia*, 365 U. S. 570, 594 (1961). The Court in *Ferguson* recognized that "when the average defendant is placed in the witness chair and told . . . that nobody can ask him any questions, and that he may make such statement to the jury as he sees proper in his own defense, he has been set adrift in an uncharted sea with nothing to guide him . . . ." *Id.* at 593. The accused may be "overwhelmed by his situation, and embarrassed . . . and . . . it will not be surprising if his explanation is incoherent, or if it overlooks important circumstances." *Id.* at 595-596. These statements were made in the context of a trial in which the accused had spoken with counsel before taking the stand, and his counsel and friends were present throughout. Moreover, the prosecutor could not cross-examine. Can there be any doubt that they are even more relevant where the accused is held incommunicado and at the same time subjected to intense, unrestrained cross-examination? *Cf. Pointer v. Texas*, 380 U. S. 400 (1965).

Finally, if counsel is present at the interrogation, he can ensure that there will be a record of the entire proceedings, so as to preserve the context in which any statement is made. He can make certain that there is no "off the record" pressure exerted on his client. Too often a court determination of the admissibility of a confession turns on whether the court believes the police or the accused in their often conflicting stories of what has occurred in that sound-proofed, windowless interrogation room. The presence of counsel will provide a witness to the interrogation process and counsel will, by his presence, deter any possibility that the police might, in their zeal to extract a confession, resort to practices intended to compel one.

This summary of the need for the presence of counsel during custodial police interrogation designed to elicit a

confession leads to a clear resolution of a number of "*Escobedo* questions" now being presented to the Court.

1. *A Police Warning of the Right to Remain Silent Is Not Adequate to Protect the Subject's Privilege Against Self-Incrimination.*

It is clear that a police warning cannot even be argued to serve any of the above-stated necessary protective functions other than the giving of the warning itself. It is submitted, however, that it does not adequately serve even this limited function.

As has been stated:

> "The Constitution does not contemplate that prisoners shall be dependent upon government agents for legal counsel and aid, however conscientious and able those agents may be. Undivided allegiance and faithful, devoted service to a client are prized traditions of the American lawyer." *Von Moltke v. Gillies,* 332 U. S. 708, 725-26 (1948) (opinion of Black, J.).

Professor Kamisar has recently written:

> "(W)hen we expect the police dutifully to note a suspect of the very means he may utilize to frustrate them—when we rely on them to advise a suspect unbegrudgingly and unequivocally of the very rights he is being counted on *not* to assert—we demand too much of even our best officers. As Dean Edward L. Barrett has asked '*(I)s it the duty of the police to persuade the subject to talk or persuade him not to talk? They cannot be expected to do both.*'" Kamisar, Equal Justice in the Gatehouses and Mansions of American Criminal Procedure, in Criminal Justice in Our Time, Magna Carta Essays (Howard, ed. 1965). (Emphasis added.)

It seems hard to state a more effective answer to a claim that a police warning is adequate than that given in the Amicus Brief of the National District Attorneys'

administration of criminal justice does not rest or depend upon some hypothetical obligation of government to indulge in acts of public charity. It does not presuppose a general commitment on the part of the federal government to relieve impoverished persons of the consequences of limited means, whenever or however manifested. It does not even presuppose that government is always required to take into account the means of the citizen when dealing directly with its citizens . . .

"The obligation of government in the criminal cases rests on wholly different considerations and reflects principles of much more limited application. The essential point is that the problems of poverty with which this Report is concerned arise in a process initiated by government for the achievement of basic government purposes. It is, moreover, a process that has as one of its consequences the imposition of severe disabilities on the persons proceeded against. Duties arise from action. When a course of conduct, however legitimate, entails the possibility of serious injury to persons, a duty on the actor to avoid the reasonably avoidable injuries is ordinarily recognized. When government chooses to exert its powers in the criminal area, its obligation is surely no less than that of taking reasonable measures to eliminate those factors that are irrelevent to just administration of the law but which, nevertheless, may occasionally affect determinations of the accused's liability or penalty. While government may not be required to relieve the accused of his poverty, it may properly be required to minimize the influence of poverty on its administration of justice."

The decisions of this Court support the statements of Professor Kamisar and the Attorney General's Committee. See *Gideon v. Wainwright*, 372 U. S. 335 (1963); *Douglas*

v. California, 372 U. S. 353 (1963); *Lane v. Brown*, 372 U. S. 477 (1963); *Draper v. Washington*, 372 U. S. 487 (1963); *Griffin v. Illinois*, 351 U. S. 12 (1956). Indeed, *Douglas v. California, supra*, seems directly on point for the issue here presented. In that case, the Court held that where an appeal is provided to all those convicted of crime, an indigent is entitled to an attorney on such appeal since the assistance of an attorney is required to effectuate this right to appeal. As we have thus analyzed *Escobedo* the parallel is obvious. There the Fifth Amendment privilege against self-incrimination is constitutionally provided to all persons. Failure to provide the assistance of counsel during police custodial interrogation designed to elicit a confession renders this right illusory in such context. Can there then be any question, under *Douglas*, that the merger of the Fifth Amendment and Equal Protection Clauses requires the appointment of counsel for an indigent?

II.

Application of the Rule in Contexts Other Than the Usual Police Custodial Interrogations Designed to Elicit a Confession.

This discussion of the meaning and application of *Escobedo* has been concerned solely with custodial police interrogation designed to elicit a confession. This is the context in which all the cases now presented to the Court arise and on the basis above set forth it is urged that the Court hold that the confessions were inadmissible in these cases.

We will not attempt to apply the analysis in this brief to all possible hypothetical cases of police interrogation not consisting of in-custody interrogation designed to elicit a confession. It is submitted that these other situations must be decided as they arise with full consideration given to the factual variants presented. *Cf. Haynes v. Washington*, 373 U. S. 503 (1963).

Where, for example, questioning is of a general investigatory type, where it is conducted in the questionee's home with family and friends present, or where there are other possible factual patterns, it may not be necessary to have counsel present in order to protect the questionee's right not to be compelled to incriminate himself. Again, the situation is far different from that analyzed in this brief, where a person volunteers a statement without any prior police questioning or pressure. While, therefore, there is no litmus paper test to solve all questions in this area, it is submitted that the basic principle remains constant. That principle is measuring the government-founded circumstances surrounding the confession against the Constitutional requirement that these circumstances not be such as to be conducive to a violation of the questionee's right not to be compelled to incriminate himself—his right "to remain silent unless he chooses to speak in the unfettered exercise of his own will." *Malloy v. Hogan,* 378 U. S. 1, 8 (1964).

It must also be remembered that neither in *Escobedo* nor in any of the cases now presented to this Court has there been any evidence that what was conducted was not usual police interrogation designed to elicit a confession. In none of these cases has there been any evidence that there were operative, either by legislative determination or police practice, protective devices other than the presence of counsel that might even arguably be effective in dispelling the inherently compelling nature of this type of interrogation.

Although your Amicus feels that the chances are unlikely it is, of course, possible that protective devices other than the presence of counsel may be devised and become operative which are effective to protect the Fifth Amendment right in police custodial interrogation and thereby remove the need for the presence of counsel for this purpose. If such new devices are proposed and become operative, of course, it would be the duty of the courts to deter-

mine whether or not they meet the need. A holding that under the available devices of today, the presence of counsel is necessary to protect the Fifth Amendment right should not foreclose a determination that other available protective devices are equally acceptable when and if such devices are formulated.

As stated above, however, neither in *Escobedo,* nor in any of the cases now before this Court, have any of the government parties argued the availability or advisability of other protective devices. Indeed, the government arguments in the present cases are that not even the clearly inadequate devices of a police warning or prior access to counsel should be provided in an attempt to dispel the compelling nature of police custodial interrogation designed to elicit a confession. What is desired is the unrestrained existence of this compelling situation.

III.

The Argument That Police "Need" the Existence of the Compelling Nature of Custodial Interrogation Must and Should Be Rejected.

It is argued to this Court that restrictions on the powers of the police freely to interrogate suspects as here advocated will prevent effective police work and thus contribute to what is asserted to be a mounting crime rate and that, therefore, the balance in this area must and should be struck, not on the side of the protection of individual liberties, but on the side of this asserted police need.

A. Even if Such "Need" Were Shown the Constitution Requires That the Balance Be Struck on the Side of Effective Enforcement of the Fifth Amendment.

It is submitted that even if these claims of police need were substantiated, the Constitution requires that the bal-

ance here be struck on the side of effectively enforcing an accused's Fifth Amendment right not to be compelled to incriminate himself.

As the Court stated in *Escobedo,* 378 U. S., at 488-490:

> "Our Constitution, unlike some others, strikes the balance in favor of the right of the accused to be advised by his lawyer of his privilege against self-incrimination. . . .
>
> "We have learned the lesson of history, ancient and modern, that a system of criminal law enforcement which comes to depend on the 'confession' will, in the long run, be less reliable and more subject to abuses than a system which depends on extrinsic evidence independently secured through skillful investigation. . . .
>
> "We have also learned the companion lesson of history that no system of criminal justice can, or should, survive if it comes to depend for its continued effectiveness on the citizens' abdication through unawareness of their constitutional rights. No system worth preserving should have to *fear* that if an accused is permitted to consult with a lawyer, he will become aware of, and exercise, these rights. If the exercise of constitutional rights will thwart the effectiveness of a system of law enforcement, then there is something very wrong with that system." (Emphasis in the original.)

B. However, It Is Not Necessary for This Court to Face the Ultimate Balancing as the Asserted Police "Need" Has Not Been Shown to Exist.

This ultimate balancing issue, however, need not be reached as the case for the asserted police "need" has not been made out. For an analysis of the available data, see Kamisar, On the Tactics of Police-Prosecution Oriented Critics on the Courts, 49 Cornell L. Q. 436 (1964).

The first point in the police-necessity thesis is the postulate that there is a clear link between court decisions protecting the rights of the accused and an alleged upward advance in the rate of criminal behavior. Even if it is assumed that there has been a rise in criminal behavior in the last few years, an issue not at all free from doubt, see Kamisar, *supra,* 49 Cornell L. Q., at 462, it is clear that there has been no showing of a link between such a rise and court decisions securing individual liberties.

Certainly no statistical data has been produced to show such a link. See Kamisar, *supra,* 49 Cornell L. Q., at 458-471. While admitting this lack of statistical data, Professor Inbau, a leading spokesman for police necessity, has argued that "simple logic" supports the existence of such a link. Inbau, *More About Public Safety v. Individual Civil Liberties,* J. Crim. L. C. & P. S., 329, 331 (1962). Professor Inbau has recently stated that "since most crimes are solveable only by this interrogation opportunity, whenever you get the courts restricting that interrogation opportunity, you are going to solve fewer crimes and you are going to catch fewer criminals. Furthermore, the incentive to commit crime as well as the actual amount of crime is going to increase." *A Forum on the Interrogation of the Accused,* 49 Cornell L. Q. 382, 387-388 (1964).

Assuming *arguendo,* that interrogation opportunity is necessary to solve crimes and convict criminals, is it clearly a matter of "simple logic" that there is a causal connection between restricting this opportunity and an increased incidence of criminal behavior? It hardly needs to be stated that the roots of crime are planted in a number of complex social factors such as: discrimination, environment, drug addiction and unemployment, as well as individual psychological and psychiatric variants. We are only now beginning to gain the necessary knowledge in order to cope with and treat causes rather than symptoms. It is

just too simplistic a form of logic to ascribe criminal behavior to court decisions.

Indeed, it may well be argued that "simple logic" indicates that there is a causal link between unrestrained police conduct and a high incidence of criminal behavior.

As Mr. Justice Brandeis has so eloquently written:

> "In a government of laws, existence of the government will be imperilled if it fails to observe the law scrupulously. Our Government is the potent, the omnipresent teacher. For good or for ill, it teaches the whole people by its example. Crime is contagious. If the Government becomes a lawbreaker, it breeds contempt for law; it invites every man to become a law unto himself; it invites anarchy. To declare that in the administration of the criminal law the end justifies the means —to declare that the Government may commit crimes in order to secure the conviction of a private criminal—would bring terrible retribution. Against that pernicious doctrine this Court should resolutely set its face." *Olmstead v. United States,* 277 U. S. 438, 485 (1928) (dissenting opinion), quoted with approval by the Court in *Elkins v. United States,* 364 U. S. 206, 223 (1960) and *Mapp v. Ohio,* 367 U. S. 643, 649 (1961).

Recently, Judge Bazelon has amplified this thought:

> "We should be aware that if the protections of the Bill of Rights are restricted we shall, in practice, be affecting directly the rights of only our more deprived population. When we talk about arrests for investigation, lengthy police interrogation prior to arraignment, and the like, the subject under discussion is not you or I. We don't get arrested without probable cause because, to put it plainly, we don't 'look' as if we would commit acts of violence and we do look as if it might not pay to trifle with our rights. Nor would you or I be subjected to long interrogation by the

police without the benefit of counsel. Nor do you and I live in neighborhoods where the police dragnet is used, and where suspects are subjected to wholesale arrest. "So the issue really comes down to whether we should further whittle away the protections of the very people who most need them—the people who are too ignorant, too poor, too ill-educated to defend themselves. Can we expect to induce a spirit of respect for the law in the people who constitute our crime problem by treating them as beyond the pale of the Constitution?" Bazelon, *Law, Morality & Civil Liberties,* 12 UCLA L. REV. 13, 27-28 (1964).

This is not to say that any "simple logic" shows that there is a causal link between lack of restraints on the police and an increased incidence of criminal behavior. It is to say that the converse "simple logic" is not self-evident and that in this area of complicated sociological and psychological factors there are no "simple logic" answers.

In particularizing the police necessity argument in the area of unrestrained police interrogation, its proponents argue that restraints on police interrogation such as here advocated will result in the elimination of the obtaining of confessions, see *Escobedo,* 378 U. S., at 488, and that the resulting unavailability of confessions will drastically reduce the possibility of obtaining convictions of the guilty. See e.g., N. Y. TIMES, Dec. 2, 1965, p. 1, col. 2; *id.,* May 14, 1965, p. 39, col. 1.

It does not seem, however, that either "simple logic" or available statistical data supports these assertions. Even if it is assumed that the current practice of most prosecutors is not to interrogate suspects when counsel is present, see Note, 73 YALE L. J. 1000, 1042, 268:

"[T]he fact that most prosecutors do not now interrogate a man once he has obtained counsel does not mean that they would find interrogation with counsel

useless. Nor does the present practice of criminal lawyers of advising his client to keep silent during interrogation mean that he would invariably advise silence if he were permitted to be present and to have some control over the process. The attorney has not, contrary to generally accepted notions, seen his role as constant impediment to the criminal process, making it as hard for the state as possible. In many cases full disclosure is exchanged for a lesser charge. In fact, more guilty pleas are obtained from counseled defendants than from non-counseled ones. Furthermore, an attorney may find the flow of information helpful. Counsel now does not invariably advise his client not to take the stand at trial. Similarly, at interrogation, participating counsel may find out what the District Attorney really knows about the case." *Id.*, at 1049.

Indeed, not all prosecutors urge that they or the police need the power of secret interrogation; witness the remarks of District Attorney Aaron E. Koota, N. Y. TIMES, Nov. 22, 1964, p. 35, col. 1, under whose jurisdiction the ill-fated and much publicized "confession" of George Whitmore, Jr. was elicited. See also Sutherland, *Crime and Confession*, 79 HARV. L. REV. 21, 37-39 (1965).

More significantly, there is no substantiation for the claim that confessions are necessary to the conviction of the guilty. Attempts to obtain confessions may be used as "easier" substitutes for proper, independent police investigatorial processes. Moreover, confessions are sometimes sought even when ample other evidence is already in hand. Police have attempted to elicit confessions when the crime has been committed in front of a dozen witnesses, indeed when it has been committed in the presence of the police themselves. For example, there could scarcely have been less need for a confession than was present in the circumstances of *People v. Dorado*, 42 Cal. Rptr. 169, 398 P. 2d 361 (1965), *cert. denied*, 381 U. S. 946 (1965). See

also Sobel, The Exclusionary Rules in the Law of Confessions, A Legal Perspective—A Practical Perspective, Part Six, N. Y. Law J., Nov. 22, 1965, p. 1, col. 4.

As the Court stated in *Haynes v. Washington*, 373 U. S. 503, 519 (1963):

> "This case illustrates a particular facet of police utilization of improper methods. While history amply shows that confessions have often been extorted to save law enforcement officials the trouble and effort of obtaining valid and independent evidence, the coercive devices used here were designed to obtain admissions which would incontrovertibly complete a case in which there had already been obtained, by proper investigative efforts, competent evidence sufficient to sustain a conviction. The procedures here are no less constitutionally impermissible, and perhaps more unwarranted because so unnecessary. There is no reasonable or rational basis for claiming that the oppressive and unfair methods utilized were in any way essential to the detection or solution of the crime or to the protection of the public. The claim, so often made in the context of coerced confession cases, that the devices employed by the authorities were requisite to solution of the crime and succession prosecution of the guilty party cannot here be made."

It should also be noted that India and Scotland have strict rules excluding from evidence confessions obtained as a result of police interrogation and such rules do not seem to have marked effects on law enforcement in those countries. See, Note, 73 Yale L. J. 1000, 1045-1046 (1964). Nor has any substantial adverse effect of law enforcement been shown in the federal and state jurisdictions that operate under the *McNabb-Mallory* rule or an equivalent. *Id.*, at 1046.

While these facts by no means prove that the eliciting of confessions is not essential to the solution of crime and the conviction of the guilty, they do cast substantial doubt

pect, who is being interviewed or interrogated. The subject in this sense is not necessarily the subject of the case under investigation. Where the term is used to refer to the subject of the case, the distinction will be apparent from the phrasing and context. A subject is ordinarily interrogated for one of the following purposes:

1) To obtain a confession to the crime.

2) To induce the subject to make admissions.

3) To learn the facts and circumstances surrounding a crime.

4) To learn the identity of accomplices.

5) To develop information which will lead to the recovery of the fruits of the crime.

6) To discover the details of any other crimes in which the suspect participated.

2. The Interrogator

The interrogator must be able to dominate his subject, not through use of his formal authority but because his personality commands respect. He must be professional in attitude and performance. If he reveals any wavering tendencies the suspect may discover the means of resisting the interrogation. To inspire full confidence, the force of the investigator's personality should be tempered by an understanding and sympathetic attitude. The subject must feel instinctively that he is talking man-to-man with a person who is interested in his viewpoint and problems. The suspect who has been forced to cooperate with hostile organizations will tell his story much more readily if he feels that the investigator understands his helplessness and is inclined to take his plight into consideration. The following qualifications and traits are desirable in an interrogator:

a. *General Knowledge and Interests.* To a large degree, the efficiency of an investigator is commensurate with

his general knowledge. To acquire this breadth of knowledge, the investigator must develop intellectual curiosity and a keen sense of observation. He must cultivate a genuine interest in people and their problems, for such knowledge will help him in determining motives as he deals with many types of personalities in a variety of circumstances. It is highly desirable that he have a wide range of knowledge concerning professional and technical matters, since his subjects represent nearly every phase of human activity. The background and personality of these individuals, together with the information they provide, can be assessed adequately only if the interrogator is prepared to discuss their major interests intelligently and to analyze their motives in light of environmental factors.

b. *Alertness.* The variety of problems confronting him requires the interrogator to be constantly alert so he can analyze his subject accurately, adapt his technique to the requirements of the case, uncover and exploit leads, and alter his tactics when necessary. A sense of logic will not in itself quickly reveal contradictions in a subject's story; it must be accompanied by a quick awareness of the contradictory information. Discovery of gaps in the subject's story after the interrogation is less satisfactory than on-the-spot recognition, because the time interval gives the subject opportunity to reflect upon the matter before questioning is renewed.

c. *Perseverance.* Every interrogation requires a great deal of patience if complete and accurate information is to be obtained. The need for patience is obvious when lack of cooperation is encountered; but perseverance frequently is required even when the suspect is willing to help but is unable to recall precisely the complex ramifications of his story or to explain discrepancies.

d. *Integrity.* If the individual being questioned has reason to doubt the integrity of the interrogator, it is practically impossible for the latter to inspire confidence or

trust. The interrogator must never make a promise he cannot keep; he should keep all promises he makes.

e. *Logical Mind.* The interrogator must develop the questioning along a logical line. The objectives of the questioning should be clearly defined in his own mind. A plan of questioning should be built around the requirements of establishing the elements of proof of the offense.

f. *Ability in Observation and Interpretations.* He must not only develop the ability to "size up" an individual, but also must learn to observe and interpret his reaction to questions.

g. *Power of Self-Control.* He must maintain control of himself at all times. Loss of temper results in a neglect of important details.

h. *Playing the Part.* It is quite justifiable during questioning, if it will accomplish the desired results, for the investigator to act as though he were angry or sympathetic to suit the needs of the situation.

2. Conduct of the Interrogator

The behavior of the interrogator at the outset of the questioning usually establishes the atmosphere that will prevail throughout the interrogation. It is of great importance for the investigator to develop an effective personality that will induce desire to respond in the subject. Personal mannerisms must be controlled wherever they distract or antagonize. The following are some of the more useful reminders concerning attitude and demeanor:

a. *Dominate the Interview.* The interrogator must always be in command of the situation. The strength of his personality must constantly be felt by the subject. He must never lose control through indignation, ill temper, hesitancy in the face of violent reactions, or obvious fumbling for questions as a result of a lack of resourcefulness.

b. *Distracting Mannerisms.* The subject must be impressed with the seriousness of the interrogator's purpose. Pacing the room, smoking, "doodling," and similar forms of behavior should be avoided, since they tend to convey a sense of inattentiveness or a lack of concentration. The investigator should seat himself close to the subject with no intervening furniture and focus his attention on the subject. The full weight of his personality must be brought to bear on the emotional situation. Distance or obstructions provide the subject with a small degree of confidence and relief.

c. *Language.* The speech of the interrogator should be adapted to the subject's cultural level. Profanity and vulgarity should be avoided, since they diminish the effectiveness of the interrogator by compromising his dignity or antagonizing the subject. The uneducated subject must be approached in his own language. Simple, forthright diction should be employed. It is especially important in sex cases to avoid ambiguities. Slang may be used if it provides ease of speech or fluency to the subject. The choice of words should be made with a view to encourage a free flow of speech in the subject. Where the subject may shy away from words such "assault" and "steal," he may not hesitate to admit that he "hit" or "took." It is a natural tendency for a person to describe his conduct in terms of euphemisms.

d. *Dress.* Civilian dress is more likely to inspire confidence and friendship in a criminal than a uniform. The accoutrements of the police profession should be removed from view. The sight of a protruding gun or billy may arouse an enmity or defensive attitude on the part of the criminal.

e. *Attitude.* The interrogator is not seeking to convict or punish. He is endeavoring to establish the facts of the case; to discover the truth; to clarify a misunderstanding; to help the criminal to straighten himself out; to clear up

this mess; to simplify matters; to rectify an unfortunate situation; to see what he can do to help the subject to help himself; to get rid of a distasteful task as painlessly as possible; to see that the subject's accomplices are not doing him an injury; and so forth. There is an endless series of locutions with which the investigator can attractively decorate his role in the administration of justice.

f. *Preliminary Conduct.* In military and certain other federal investigative agencies, it is required that the interrogator identify himself and show his credentials to the subject. He must then state, in general terms, the purpose of the interrogation. Before beginning the questioning, the must advise the suspect of his rights against self-incrimination and inform him that he does not need to answer the questions and that if he does answer, his answers can be used as evidence against him.

g. *Presence of Other Persons.* It is desirable to restrict the number of persons present at an interrogation. If a confession is obtained the defense may claim the existence of duress because of the presence of five or ten police officers. Moreover, some courts require the prosecution to produce all the witnesses of a confession. A parade of ten detectives to the witness stand creates an unfavorable impression and opens up the likelihood of inconsistencies of the testimony. Ordinarily the interrogator should be alone with the subject. Other parties may be brought in for a specific purpose, such as witnessing the signing of a confession.

3. Place

If at all practicable, the interrogation should take place in the investigator's office or at least in a room of his own choice. The subject should be deprived of every psychological advantage. In his own home he may be confident, indignant, or recalcitrant. He is more keenly aware of his rights and more reluctant to tell of his indiscretions

or criminal behavior within the walls of his home. Moreover his family and other friends are nearby, their presence lending moral support. In his own office, the investigator possesses all the advantages. The atmosphere suggests the invincibility of the forces of the law. The structure, the personnel, and all observable activities have but one purpose—the discovery of truth and the detection of crimes.

4. The Interrogation Room

The room chosen for the interrogation should provide freedom from distractions. Secondarily, it should not be designed to give encouragement to the suspect. The following ideal requirements are listed with these two principles as a basis:

a. *Privacy.* Interruptions dispel an amtosphere that may have been carefully created by the interrogator, hence, the following are desirable:

1) *One door.* Several doors suggest possible interruption and destroy the feeling of inevitability.

2) Absence of windows or view.

3) Sound-proofing.

4) Telephone without bell.

b. *Simplicity.* Distracting influences should be kept to a minimum. The suspect may strive to avoid the investigator's concentration by focusing his attention on some object in the room which suggests a different train of thought.

1) Medium sized room.

2) Bare walls. Pictures and charts are distracting.

3) No glaring lights.

4) Minimum furniture.

c. *Seating Arrangement.* The suject and the investigator should be seated with no large furniture between them.

1) *Chair.* Armless, straight-back chair for the suspect.

2) *Table or Desk.* The investigator requires a flat surface on which to place papers and articles of evidence.

3) *Suspect.* Seating the suspect with his back to the door further deprives him of any hope of interruptions or distraction.

d. *Technical Aids.* Although the investigator should be alone with the subject, it is desirable to have facilities for others to observe and hear the suspect during the interrogation. Other investigators may suspect the subject of participation in other crimes. Thus the interrogation room can also serve as a line-up or show-up room. In an important case the investigator will require the assistance of his associates. By their listening unobserved to the interrogation they may be able to make useful suggestions and draw more objective conclusions. Persons such as the prosecuting attorney will find this opportunity to observe the prospective defendant invaluable in preparing his case. Victims and complainants are enabled to make identifications.

1) *Recording Installation.* Important interrogations and confessions should be recorded.

2) *Listening Device.* A hidden microphone such as a "live" telephone should be installed.

3) *Two-Way Mirror.* This device appears to be a plain mirror on one side but permits a person on the other side to see through without being observed. Unfortunately the typical two-way mirror installation is obvious and is familiar to the experienced criminal. A more deceptive arrangement can be devised with a little ingenuity. A framed picture with a mirror strip border is less familiar.

A medicine chest with a mirror door will pass unnoticed if a small sink is installed beneath it.

5. Selection of Technique and Approach

In the work of an interrogation, the principle of economy of means should guide the investigator. The simplest approach is best if it achieves the desired result. The interrogator should not be unnecessarily devious. He may outwit himself with his own cleverness or antagonize the subject by creating an unwanted confusion. Ingenuity is desirable when it is required, but it should not be considered as a satisfactory substitute for intelligence. The interrogator must first classify or analyze his subject with the aid of information or criminal records. A preliminary interview will often assist in determining the character and personality of the suspect and in planning the techniques to be used. With experienced criminals, the methods described under *Anxiety* and *The Stern Approach* are more effective, since although this type of person may not be reached by an emotional appeal he will accede to the logical cogency of the case that has already been built up against him by the investigator. With first offenders and those subject to feelings of regret, repentance, and mental anguish, a direct appeal on a friendly basis is more effective. Failing this, they may experience fear and apprehension if the interrogator expresses himself in terms of official indignation. As a general rule, the investigator will find that the direct, friendly approach should be tried first and a gradual progression can be followed to the more complex techniques. This must be qualified by the observation that some of the techniques, such as the pretense of physical evidence, can lose their effect if they are applied at the wrong stage of the questioning. The subject may develop a doubt as to whether there is a strong case against him if widely varying techniques are used. The interrogators should never reveal the weakness of their position by haphazardly testing different techniques. The methods should

be applied economically and with careful planning. It is important to restrict the questioning to at most two interrogators. A multiplicity of interrogators results in neutralizing the effects of various techniques.

6. Interrogation Techniques

There are many techniques of interrogation which the investigator can employ. His choice should depend on the nature of the crime under investigation, the character of the subject and on his own personality and limitations. The following are some of the techniques practiced by experienced investigators.

a. *Emotional Appeals.* The investigator must create a mood that is conductive to a confession. To place the subject in the proper frame of mind, he should provide emotional stimuli that will prompt him to unburden himself by confiding. In achieving this aim, the interrogator must combine the qualities of an actor and a practical psychologist. He must be able to roughly analyze the subject's personality in a short time; decide what motivation would prompt him to tell the truth; and then provide those motives by appropriate emotional appeals.

1) *Sympathetic Approach.* The suspect may feel the need of friendship. He is apparently in trouble. An offer of friendship accompanied by small acts of kindness may win his cooperation. The interrogator understands the plight of the subject. He appreciates the fact that even fellows like the subject become involved in difficult situations. He is ready to listen to the subject's story of his early life and its lack of opportunities. He understands how easy it is for a fellow to become a victim of drink or narcotics. He knows that the subject has merely used bad judgment in the affair and certainly would never again become so involved. Perhaps if he and the subject were to discuss the matter freely they could find an explanation.

After all, it is really a misunderstanding that has arisen. Unfortunately, the affair is technically a violation of the letter of the penal code and the police must comply with certain regulations. We could keep this unpleasantness to a minimum by a candid discussion of the whole affair.

2) *Kindness.* The investigator has appraised the personality of the subject and finds him a normal person in his desire for consideration. Kindness is in order. The investigator knows what it is to be in a spot. How about the family—the subject's mother, wife, or children? Is there anything the subject would wish the investigator to do for them? The subject's employer? The subject's property? His car, for example? Obviously, the subject and the investigator can get along together. Perhaps the investigator can assist the subject in his personal problem? There is no limit to the things that can be achieved by cooperation. We are not alone in this world.

b. *Friendliness.* The simplest of techniques is to assume that the suspect is willing to confess if he is treated in a friendly spirit. This treatment may take several forms which although similar to the emotional appeals described above are not as simple and direct.

1) *The Helpful Advisor.* The investigator is the subject's friend. Between the two of them they are going to straighten things out. The subject is bewildered by the recent happenings. If he explains the whole thing from the beginning, his friend, the investigator, will try to advise him. The investigator understands the law, the district attorney, and police procedures. Who is in a better position to help the subject?

2) *The Sympathetic Brother.* The subject needs to square things with his own conscience. For the sake of his family and himself, he should make a clean breast of the affair. His friend the investigator has seen other persons in similar circumstances. He knows the suspect is

conceived notions of "kid gloves" treatment. A judicious application of the following techniques may induce dismay and cause him to plead with the interrogator. They should, however, be used only if it is highly probable that the subject is guilty.

1) *Pretense of Physical Evidence.* The interrogator states that he does not need any confession and isn't particularly interested in the suspect's reasons. There are, however, a few formalities he must go through. He is required to inform the suspect of certain findings and give him an opportunity to explain certain evidence. The interrogator then pretends that certain physical evidence, appropriate to the case, has been found by laboratory experts. The average person has mystical notions of the power of scientific crime detection and will accept practically any claims that science may make. Thus the detective can mix pseudoscience in his statements. In a hit-and-run case, for example, the interrogator can suggest that blood has been found on the car and that the laboratory experts have determined it to be the victim's blood. In a homicide, the interrogator can refer to hair found at the scene of the crime, which can be shown, under the microscope to be the suspect's hair. For added realism, the suspect can be invited to look into the microscope. In a document case, such as a forgery or a threatening letters case, a comparison of handwriting can be represented as being conclusive. Fingerprints are the most effective form of evidence. The layman believes that they can be left on any object. The investigator should select some object which was known to have been touched and should face the suspect with the object. It does bear fingerprints and the fingerprints have been photographed. The interrogator can show at a discreet distance a small photograph of a latent fingerprint. The imaginative investigator can create his own dramatic effects such as having the interrogation interrupted by the delivery of a message to the effect that the fingerprints on the

weapon have been identified, or that the handwriting has been positively compared.

2) *Jolting.* This device is especially useful when dealing with a person unusually calm or nervous. The questioning is conducted at some length in a quiet, almost soothing manner. By constantly observing the suspect, the investigator chooses a propitious moment to shout a pertinent question and appear as though he is beside himself with rage. The subject may be unnerved to the extent of confessing. If he appears moved, the interrogator will work him up to a pitch with a climactic series of questions.

3) *Indifference.* The investigator is not particularly interested in the subject. The subject's conviction is treated as a *fait accompli.* There are witnesses and physical evidence. There is an absence of an alibi. The subject's behavior during the period in question is an open book to the police. To accomplish this effectively, the interrogator should discuss the case with another investigator in the presence of the subject. The purpose of the discussion is ostensibly to determine whether they can obtain a conviction for a greater crime or whether they can obtain the maximum sentence. They review the case by putting the worst construction on every aspect and expressing their annoyance at being put to this inconvenience. The aim, of course, is to induce the subject to plead with them. Only with extreme reluctance do they give any consideration to his pleas. Gradually, they become more "reasonable."

4) *Questioning as a Formality.* In this technique, the interrogator asks a series of questions as though it were a necessary formality in his routine duty. He give the impression that he knows the answer, but that he is required to ask the question in consideration of the rights of the accused. The procedure is business-like, but the interrogator pauses meaningfully as if to give the suspect *one more* chance to tell the truth. Such phrases as the following can

be used; "You were in the apartment at seven o'clock, weren't you?" "You're sure about this fact?" "Do you want me to write your answer exactly the way you said it?" "I'm going to give you a fair chance to answer this question truthfully. Think it over for a while; then, give me your answer." When the answer is not that which the interrogator expects, he puts down his pencil skeptically, looks at the suspect, stares at his note pad and shakes his head ruefully. He may make some remark such as, "I don't know what you're trying to do to yourself," or "You think you'd give yourself a break." A prolonged silence will work with equal effectiveness.

5) *Affording an Opportunity to Lie.* This technique is useful when the interrogator has used direct questioning about the crime without success. It is lengthy, time-consuming and involved, but it serves the purpose of wearing down the subject. Questions directly concerning the crime are avoided. In a cold methodical manner the interrogator first asks for detailed information concerning the subject's background. If he has knowledge of some indiscretion, he dwells around the event in great detail. He then proceeds to the activities of the subject before and after the crime in question. He goes into minute details concerning money, movements, and conversations. He repeats and re-examines until he has built up a complete structure. He supports his questioning with his own knowledge of certain facts or events. Having reached this point, the investigator leans back and in a relaxed tone, invites the subject to tell in his own words all that he knows about the offense, the victim, the complainant, possible suspects, and the circumstances surrounding his involvement in the case. From all of this information, a capable investigator will be able to detect weak points such as lies, inconsistencies, improbabilities, and gaps. He should be patient, methodical, and aloof, willing to go over the events again, step-by-step and in minute detail in order to "get the facts straight" for his report.

The subject will, ordinarily, continue to answer questions, since he cannot know that all this information is not necessary for an investigative report. He is willing to assist the interrogator in developing his report. The interrogator gives the impression that he is not interested in guilt or innocence; he wishes only to obtain details for his report. No person, obviously, should prevent the police from accomplishing their report by refusing to answer routine questions. Finally, the investigator will have acquired an immense, complex, but not quite coherent structure of facts, data, descriptions, and events. It should not be difficult to discover a number of lies in this welter.

At a "psychological moment" when the subject appears confused and dispirited another tack can be taken. The investigator can suddenly become overwhelmingly indignant, throw down his pad and pencil and demand the truth forthwith. On the other hand an associate investigator can take advantage of a pause, in private, to suggest to the suspect that he can "straighten things out" by forgetting all these details and getting down to a few simple admissions. Alternatively, the detailed questions can continue and the discrepancies can be pointed out in an assured and determined manner.

7. Control

One of the first lessons to be learned by the inexperienced investigator is the unfortunate ease with which he can lose control of the interrogation. As he questions the suspect, unexpected answers are received and his strategy is pushed off its course. Startling emotional reactions on the part of the suspect may upset him. He may become impatient in the face of obstinacy or angry with the appearance of impertinence. With the tone of the interrogation changed and the sequence of his presentation altered, he may find himself caught in a discouraging stalemate. Although experience will remedy these defects, initial train-

ing according to sound principles will enable him to avoid the pitfalls at the outset.

a. *Initial Phase.* In the beginning of the typical interrogation the investigator has little need for control. The subject should be permitted to tell his story in his own way without interruption. A few general questions will lay the groundwork. Often the suspect, after he is once launched in his narrative, will work himself into a confession. At this stage the investigator should restrict himself to assisting the subject when there is an obvious need for a word or phrase.

b. *Questioning.* After the narrative phase of the interrogation, planned questions should be put to the subject. The tone of the interrogation will now be set by the responses of the subject. Spontaneous answers which appear to be given without much reflection are particularly valuable and trustworthy. If the subject appears to be cooperating, the investigator should endeavor to develop in him a pride in his cooperation.

c. *Emotion Control.* If the subject seems reluctant to cooperate, the investigator should make every effort to remain clean. A loss of temper will cut off the small trickle of information. Anger may swiftly lead to duress. The suspect, moreover, will sense his own superiority in remaining calm. Deliberate anger as a tactic in interrogation is, of course, a different matter. Harassing the suspect should ordinarily be avoided since it can result in false statements. It is always possible that the suspect does not have the information. The indifferent type may give the desired answer regardless of its truth merely to be rid of the oppression of the interrogator. Instead of yielding to feelings of contempt, impatience, sarcasm, or anger, the interrogator can find relief in putting his efforts into the expression of emotions or sentiments such as patriotism, motherhood, childhood, religion, or fidelity to ideals.

d. *Strategic Interruptions.* When the interrogator senses that he is losing control or that his tactics are availing nothing, it may be time to pause and do additional planning or introduce a new technique. The interrogation room should be equipped with a button and buzzer under the top of the desk, which the investigator can push with his knee or foot. In this way, he can sound the buzzer, pretend it is a signal for him and leave the room.

8. Physiological Symptoms

Careful observation of the physical state of the subject as influenced by his emotion will often give a clue to guilty knowledge or deception. The various symptoms observable in the subject are sometimes consistent with a state of nervousness as well as guilt. Physical manifestations can be pointed out to the suspect as evidence that his guilt is obvious. The following observations are generalities which may sometimes be useful, but which must always be modified in relation to the temperament of the individual.

a. *Sweating.* If the face is flushed, anger is indicated. Embarrassment or extreme nervousness may also be the case. A pale face indicates fear or shock. Sweating hands indicate tension.

b. *Color Changes.* A flushed face indicates anger, shame, or embarrassment but not necessarily guilt. A pale face is a more reliable sign of guilt.

c. *Dry Mouth.* Great nervous tension is present. This is considered a reliable symptom of deception. Swallowing, wetting of the lips, and thirst are indications of dryness of the mouth.

d. *Pulse.* An increase in the rate of heart beat is indicative of deception. The pulse beat is observable at times in the veins of the neck.

e. *Breathing.* Deception is indicated by an effort to control breathing during critical questions.

9. PERSEVERANCE

In the preceding paragraphs emphasis has been placed on kindness and stratagems. The investigator will, however, encounter many situations where the sheer weight of his personality will be the deciding factor. Where emotional appeals and tricks are employed to no avail, he must rely on an oppressive atmosphere of dogged persistence. He must interrogate steadily and without relent, leaving the subject no prospect of surcease. He must dominate his subject and overwhelm him with his inexorable will to obtain the truth. He should interrogate for a spell of several hours pausing only for the subject's necessities in acknowledgment of the need to avoid a charge of duress that can be technically substantiated. In a serious case, the interrogation may continue for days, with the required intervals for food and sleep, but with no respite from the atmosphere of domination. It is possible in this way to induce the subject to talk without resorting to duress or coercion. The method should be used only when the guilt of the subject appears highly probable.

10. SPECIAL GROUPS

Two groups of offenders deserve special mention here because of the relative ease with which they may be induced to make confessions if they are interrogated with a moderate amount of skill.

a. *The Juvenile.* Two classes must be distinguished: the indignant offender with bad character and disreputable background and the person who comes from a "good family." The expressions "criminal" and "non-criminal" type will be employed.

1) *Non-Criminal Type.* The boy (or girl) has been raised to believe in moral principles and to respect authority, but is a little wild and has yielded to temptation; he is rarely intelligent and his inexperience makes him gullible.

He is susceptible to emotional appeals by reason of his training and "believes" in so many things that the investigator has a wide choice of methods by which to motivate him. "Mother" is a magic word for inducing a state of repentance and a desire for confession. Since the boy is usually frightened at the outset, the investigator can rely on a friendly approach and an emotional appeal.

With a headstrong boy, an investigator should carefully avoid humiliating him by compromising his courage or pride. Lacking common sense and being careless of the consequences, he may rebel at an affront and remain obdurate. A friendly appeal to his manhood is effective. Is he man enough to admit his guilt? What would his mother think of him? How can he and the investigator cooperate so that mother won't be hurt? What should we tell mother?

2) *The Criminal Type.* Where poverty and bad environment have wrought their scars on the boy's character, the investigator's greatest problem is prevarication. The lie is an integral part of the mode of the subject's thinking. Another difficulty is a reluctance to become a "stool pigeon," attended by a heroic silence. An aggravated form of this attitude is an excessive dislike of "cops." The fine arts of detective fiction and mystery cinema have inculcated in the boy the notion that there is no profession lower than that of the cop. The police officer is his natural enemy.

Although emotional appeals are far less effective with this type of subject, they should be given a trial at the outset. The friendly approach should be used throughout. The utmost care must be exercised to avoid permitting the boy to assume the role of a martyr. If the investigator is harsh, fancied martyrdom is simple to conjure up. On the other hand, where the investigator is persistently friendly, even to the point of fatuity, the boy will feel foolish in maintaining an air of a rebel without a cause. The stern approach should be used as a last resort.

The investigator must rely heavily on the tactic of trapping the subject in ridiculous lies. The boy has no desire to lose face in such an ignominious way as being repeatedly caught in contradictions and inconsistencies. After he has been caught in a number of lies, it should be suggested to him that he "smarten up." Naturally, in the half-fictional world that he mentally inhabits, it is of the utmost importance to be "smart." Not even the movies admire the "dumb" thug.

The appeal to his pride in being "smart" should be used again by pretending that his friends or accomplices have "talked" and told everything. Is he going to hold the bag? Since Bogart, Cagney, Robinson and Raft are never seen holding the bag, there is little likelihood that the subject will fancy himself in such a position. He will wish to "get revenge on them." With the aid of the investigator, this is a relatively simple matter. After all, the investigator has no desire to see his friend, the subject, shouldering all the blame.

b. *"White Collar" First Offenders.* This category includes persons such as the grocery clerks or bank cashiers who came from "poor but honest" parentage; middle-class offenders such as office managers and owners of small businesses; military officers; teachers; civil service workers; and other groups who are traditionally known to subscribe to orthodox ethical principles and conventional moral standards. The crime is usually larceny by theft, forgery, or embezzlement. Rarely it is murder or robbery. It is not difficult to obtain a confession. The personal dignity and pride of the subject must be respected. If these are assaulted by a crude remark, the subject may rebel and remain obstinate. The calm, dignified approach of a physician will lull the subject's fears and lead him to believe that if he cooperates the road will be smooth. Since he is usually naive and knows little of the seamier side of life, his conception of his fate will be unrealistic. The investi-

gator should begin with the "Dutch Uncle" approach. His job is to help people in trouble. He has seen cases like this before and things have worked out smoothly. He knows what the subject has done; that's a thing of the past. "Let's see what we can do about the future. First of all, we'll clear the decks. Tell us in your own words what happened and give us everything that's in your favor so that we can do what we can for you. And stop worrying. Let us do the worrying about the case. If we all cooperate, we can get somewhere." A psychological "lift" such as this is like a sedative before an operation. Things aren't half as bad as he had imagined them. It's good to find that they have intelligent men on the police force. . . . The character of a person in this category is weak, and this defect must be exploited fully.

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Ares, Rankin and Sturz, *The Manhattan Bail Project: An Interim Report on the Use of Pre-Trial Parole,* 38 N.Y.U.L. Rev. 67 (1963) 24

Barrett, *Police Practices and the Law—From Arrest to Release or Charge,* 50 Calif. L. Rev. 11 (1962) 26

Bator, *Finality in Criminal Law and Federal Habeas Corpus for State Prisoners,* 76 Harv. L. Rev. 441 (1963) 47, 50

Bator and Vorenberg, *Arrest, Detention, Interrogation and the Right to Counsel: Basic Problems and Possible Legislative Solutions,* 66 Col. L. Rev. 62 (1966) 26, 36

Beaney, THE RIGHT TO COUNSEL IN AMERICAN COURTS (1955) 16

Dowling, *Escobedo and Beyond: The Need for a Fourteenth Amendment Code of Criminal Procedure,* 56 Jour. Crim. Law, Criminology & Police Science 156 (1965) 9

Enker & Elson, *Counsel for the Suspect: Massiah* v. *United States* and *Escobedo* v. *Illinois,* 49 Minn. L. Rev. 47 (1964) 9

Fairman, *Does the Fourteenth Amendment Incorporate the Bill of Rights: The Original Understanding,* 2 Stan. L. Rev. 5 (1949) 7

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lates, the questions are stated in general terms, rather than in the factual framework of any of the cases:

1. Whether an arrested suspect's lack of the assistance of counsel at the time he makes a pre-arraignment statement renders the statement constitutionally inadmissible at his trial.[1]

2. Whether rules presently or hereafter established within the ambit of the first question should be retroactively applied.

Summary of Argument

I

We oppose the establishment of new constitutional restrictions on the admissibility of pre-arraignment statements made in the absence of counsel. Neither the literal text nor the originally intended meaning of the "Assistance of Counsel" clause of the Sixth Amendment comprehend pre-adjudicatory stages of criminal procedure. Extension of the clause to pre-arraignment proceedings must therefore depend on a showing that such extension is required by developing concepts of fairness beyond the ambit of the original understanding. In fact, no such showing has been made. Therefore the holding of *Escobedo* v. *Illinois*, 378 U. S. 478 (1964), should not be made the basis for a general exclusionary rule of constitutional dimension.

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[1] The five cases present this question under varying attendant circumstances. See note 2, *infra*, page 11. As used in this brief, the term "arraignment" refers to the individual's first appearance before a judicial officer subsequent to his arrest. New York law requires that the magistrate before whom the individual is brought inform him at this time, and before any further proceedings are had, of his right to the assistance of counsel; and that, if he desires counsel but is financially unable to obtain counsel, then counsel will be assigned. See N. Y. Laws of 1965, c. 878, amending N. Y. Code Cr. Proc. §§ 188, 190 and 699.

This Court has repeatedly recognized the importance of pre-arraignment interrogation in the law enforcement process. See, *e.g. Haynes* v. *Washington*, 373 U. S. 503, 515 (1963). Empirical evidence now in hand affords no basis for challenging this evaluation. The Court has also recognized the hindrances which would be caused by a general requirement of counsel at the pre-arraignment stage. *Cicenia* v. *LaGay*, 357 U. S. 504, 509-511 (1958). Adoption of the exclusionary rules urged by defendants in these cases would result either in the virtual elimination of pre-arraignment interrogation, or the large scale installation of defense counsel at police stations, or both of these consequences in unpredictable proportions. Empirical evidence justifying such consequences is lacking, and neither professional nor general public concepts of fairness warrant a constitutional requirement of such fundamental changes in pre-arraignment procedures.

Procedural development in this area should take place in non-constitutional terms. State courts and legislatures, and professional organizations such as the American Law Institute, are currently and closely concerned with pre-arraignment procedures, and are alert to the need for mitigating the legal disadvantages of the indigent and uneducated. Progress toward this end, with due regard for the needs of law enforcement, will be surer with the effective participation of these agencies.

II

To whatever extent new exclusionary rules may be established in these cases or may be deemed already established by *Escobedo* v. *Illinois, supra*, such rules should not be given retroactive application. The same considerations which militated against retroactive application of newly established rules barring the admission of illegally seized evidence (*Linkletter* v. *Walker*, 381 U. S. 618 [1964]) and prohibiting adverse comment by a trial judge upon a defendant's failure to testify at a criminal trial (*Tehan* v.

Shott, —— U. S. ——, 34 U.S.L. Week 4095 [1965]) weigh heavily against retroactive application of any new rule limiting the admissibility of pre-trial statements which are not shown to have been involuntary.

There can be no doubt but that, at least prior to the decision in *Escobedo* v. *Illinois*, there was considerable and justifiable reliance by the state judicial systems upon this Court's earlier decisions establishing voluntariness as the criterion governing admissibility of a defendant's inculpatory pre-trial statement. See, *e.g.*, *Crooker* v. *California*, 357 U. S. 433 (1958). For this Court to apply a new exclusionary rule retroactively, without regard to the voluntariness of challenged statements, would be to hold that state courts and prosecutors should not have used evidence which this Court had previously told them was admissible.

The primary purpose of any new exclusionary rule limiting the admissibility of pre-trial statements would undoubtedly be to prevent police coercion and ensure that an individual's privilege against self-incrimination remains meaningful. Retroactive application would not further this purpose, however—to the extent that an exclusionary rule is an effective deterrent to police misconduct, it is because the police, after the establishment of such a rule, may be expected to act with knowledge of its sanctions. Nor would the policy of protecting the innocent be furthered by retroactive application—to the extent that the absence of counsel may have contributed to the making of an involuntary and hence possibly unreliable statement, relief is already available. See *Reck* v. *Pate*, 367 U. S. 443 (1961); *Fay* v. *Noia*, 372 U. S. 391 (1963). Judicial integrity would be diminished by such an application, since the precedental value of court decisions would be seriously undermined. Retroactive application of new exclusionary rules would not be conducive to the orderly administration of criminal justice either. Numerous old convictions would be reopened and persons convicted of serious crimes, on

reliable evidence of their guilt, would be the principal beneficiaries.

Retroactivity would also be likely to impose serious restraints upon the progressive development of new rules by the state courts. Surely one important reason why some state courts have felt free to establish new exclusionary rules has been their reasonable expectation that the new rules would not affect past cases in which convictions have become final. In addition, retroactive application would impose serious strains on the resources of the bench and bar in all the states, to the detriment of those individuals who have more deserving claims for post-conviction relief and to the detriment of the social interest in meeting pressing problems in other areas of criminal law.

Argument

The first of the two questions to which this brief is primarily addressed is raised in various forms and factual settings in all five of the instant cases, and the second question in No. 762, *Johnson and Cassidy* v. *New Jersey*. Although they are disparate in important respects, the two questions are closely interlocked, in that the reasoning and conclusions adopted for the first may well affect if not govern the answer to the second.

A basic part of our position on both of these questions is the proposition that the constitutional claims asserted in these cases are part of a developmental process rather than an "original understanding".[1] Accordingly, we be-

[1] Compare the conflicting approaches to the "original understanding" of the Fourteenth Amendment in Mr. Justice Black's dissenting opinion in *Adamson* v. *California*, 332 U. S. 46, 68-123 (1947), and Fairman, *Does the Fourteenth Amendment Incorporate the Bill of Rights: The Original Understanding*, 2 Stan. L. Rev. 5 (1949). Assuming (in line with Mr. Justice Black's position) "total incorporation" of the Sixth Amendment in the Fourteenth, we think it clear (*infra*, pp. 15-17) that the original understanding of the "Assistance of Counsel" clause did not comprehend the claims asserted here.

lieve that the Court may and urge that it should take full account of contemporary factors in determining whether, when, and how much to expand the constitutional dimension of the right to counsel in the pre-arraignment stage of a proceeding. Our assessment of these factors comprises the main body of this brief.

I

The Court should not presently enlarge the constitutional dimension of pre-arraignment rights to the assistance of counsel.

The constitutional test to be applied in determining the admissibility of confessions was restated by this Court, speaking through Mr. Justice Goldberg, in *Haynes* v. *Washington,* 373 U. S. 503, 513:

> " '[T]he question in each case is whether the defendant's will was overborne at the time he confessed' *Lynum* v. *Illinois,* 372 U. S. 528, 534. 'In short, the true test of admissibility is that the confession is made freely, voluntarily and without compulsion or inducement of any sort.' *Wilson* v. *United States,* 162 U. S. 613, 623. See also *Bram* v. *United States,* 168 U. S. 532. And, of course, whether the confession was obtained by coercion or improper inducement can be determined only by an examination of all of the attendant circumstances."

The application of this test resulted in reversal of the conviction in the *Haynes* case upon the Court's conclusion that the interrogation of the petitioner while under detention for sixteen hours, the denial of his requests for counsel, and the refusal of the police to permit petitioner to telephone his wife until he signed a confession, demonstrated the involuntariness of the confession.[1]

[1] Other recent instances in which this Court has set aside convictions upon determining that the confessions in question did not meet the test of "voluntariness" include *Lynumn* v. *Illinois,* 372 U. S. 528 (1963); *Culombe* v. *Connecticut,* 367 U. S. 568 (1961); *Reck* v. *Pate,* 367 U. S. 433 (1961); *Blackburn* v. *Alabama,* 361 U. S. 199 (1960); and *Spano* v. *New York,* 360 U. S. 315 (1959).

The following year in *Escobedo* v. *Illinois*, 378 U. S. 478, this Court considered the admissibility of a pre-arraignment statement in the context of the Sixth Amendment guarantee of the right to "the assistance of counsel".[1] The scope of that decision has been the subject of numerous and conflicting decisions in both State and Federal courts[2] and extensive discussions in legal periodicals.[3]

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[1] To whatever extent that case is deemed to establish a "new" rule concerning the admissibility of confessions, a problem of retroactivity is raised, which is discussed in Point II of this brief.

[2] See, *e.g.*, *State* v. *Miranda*, 98 Ariz. 18, 401 P. 2d 721 (1965), *cert. granted*, 86 Sup. Ct. 320; *Commonwealth ex rel. Linde* v. *Maroney*, 416 Pa. 331, 206 A. 2d 288 (1965); *State* v. *Worley*, 178 Neb. 232, 132 N. W. 2d 764 (1965); *Bean* v. *State*, 398 P. 2d 251 (Nev. 1965); *People* v. *Hartgraves*, 31 Ill. 2d 375, 202 N. E. 2d 33 (1964), *cert. denied*, 380 U. S. 961; *Anderson* v. *State*, 237 Md. 45, 205 A. 2d 281, 285 (1964); *State* v. *Smith*, 43 N. J. 67, 202 A. 2d 669, 678 (1964), *cert. denied*, 379 U. S. 1005; *Browne* v. *State*, 24 Wis. 2d 491, 131 N. W. 2d 169 (1964), *cert. denied*, 379 U. S. 1004; *State* v. *Fox*, 131 N. W. 2d 684 (Iowa 1964); *Galarza Cruz* v. *Delgado*, 233 F. Supp. 944 (D.P.R. 1964); *State* v. *Dufour*, 206 A. 2d 82 (R. I. 1965); *State* v. *Neely*, 239 Ore. 487, 398 P. 2d 482 (1965); *Commonwealth* v. *Negri*, 213 A. 2d 670, 672 (Pa. 1965); *Commonwealth* v. *McCarthy*, 200 N. E. 2d 264 (Mass. 1964); *Campbell* v. *State*, 384 S. W. 2d 4 (Tenn. 1964); *United States* v. *Cone*, —— F. 2d —— (2d Cir., dec'd Nov. 22, 1965, slip op. p. 3391); *United States* v. *Drummond*, —— F. 2d —— (2d Cir., dec'd Dec. 2, 1965, slip op. p. 3225); *United States ex rel. Russo* v. *New Jersey*, 351 F. 2d 429 (3d Cir. 1965); *United States ex rel. Davis* v. *North Carolina*, 339 F. 2d 770 (4th Cir. 1965), *cert. granted*, 86 S. Ct. 438 (1965); *Collins* v. *Beto*, 348 F. 2d 823 (5th Cir. 1965); *United States ex rel. Walden* v. *Pate*, 350 F. 2d 240 (7th Cir. 1965); *Jackson* v. *United States*, 337 F. 2d 136 (D. C. Cir. 1964).

[3] See, *e.g.*, Enker & Elsen, *Counsel for the Suspect: Massiah* v. *United States and Escobedo* v. *Illinois*, 49 Minn. L. Rev. 47 (1964); Friendly, *The Bill of Rights as a Code of Criminal Procedure*, 53 Calif. L. Rev. 929 (1965); Kamisar, *Equal Justice in the Gatehouses and Mansions of American Criminal Procedure in* CRIMINAL JUSTICE IN OUR TIME (U. Va. Press 1965); Vorenberg, *Police Detention and Interrogation of Uncounselled Suspects: The Supreme Court and the States*, 44 Boston Univ. L. Rev. 423 (1964); Dowling, *Escobedo and Beyond: The Need for a Fourteenth Amendment Code of Criminal Procedure*, 56 Journal of Criminal Law, Criminology and Police Science 156 (1965).

Whatever may in other respects be the verdict of judicial history, we think that *Escobedo,* and other recent decisions of this Court in the field of criminal procedure, have had a beneficial effect insofar as they have awakened the interest and concern of bench and bar, legislators and executive officials, police and social welfare agencies to current and crucial problems of criminal law enforcement. In the forefront of those whose concern has taken the form of organized study and the formulation of practical proposals are the American Bar Association, the American Law Institute, and the New York Commission on Revision of the Penal Law and Code of Criminal Procedure.

Because the defendant in the *Escobedo* case had already retained a lawyer and had requested opportunity for consultation which the police had denied him, prior to his confession, the case is susceptible of narrow interpretation. Indeed, this Court's own statement of the holding is very particularly worded (378 U. S. at 490):

> "We hold, therefore, that where, as here, the investigation is no longer a general inquiry into an unsolved crime but has begun to focus on a particular suspect, the suspect has been taken into police custody, the police carry out a process of interrogation that lends itself to eliciting incriminating statements, the suspect has requested and been denied an opportunity to consult with his lawyer, and the police have not effectively warned him of his absolute constitutional right to remain silent, the accused has been denied 'the Assistance of Counsel' in violation of the Sixth Amendment to the Constitution as 'made obligatory upon the States by the Fourteenth Amendment,' *Gideon* v. *Wainwright,* 372 U. S., at 342, 83 S. Ct., at 795, and that no statement elicited by the police during the interrogation may be used against him at a criminal trial."

We do not suggest that the *Escobedo* case be robbed of principled basis and practical effect by an overly meticulous insistence on its details. But we do read its holding, quoted above, as a warning that substantial variation in circumstances will require fresh consideration of the consequences. And we urge, for the reasons herein set forth, that the present cases should not be the occasion for any substantial expansion of its impact in the constitutional dimension.

These five cases (as well as a sixth to be heard later this term[1]) present a spectrum of questions closely related to those dealt with in the *Escobedo* case. As already indicated, it is not our purpose to seek either affirmance or reversal of any of these cases, for the reason that all five of them involve issues in addition to those of present interest to the *amici curiae*,[2] which may be determinative of their several outcomes.

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[1] *Davis* v. *North Carolina*, 339 F. 2d 770 (4th Cir. 1965), *cert. granted*, —— U. S. ——, 86 S. Ct. 438 (Dec. 13, 1965), transferred to appellate docket as No. 815, Oct. Term, 1965 (34 U.S.L. Week 3223).

[2] Thus No. 760, *Vignera* v. *New York*, involves a twenty-four hour period of detention prior to arraignment, from which petitioner projects arguments primarily derived from *McNabb* v. *United States*, 318 U. S. 332, and *Mallory* v. *United States*, 354 U. S. 449.

No. 761, *Westover* v. *United States*, likewise involves *McNabb-Mallory* questions, and furthermore is a federal court case, so that statutory and "supervisory" as well as constitutional factors are present. Other unrelated questions (evidentiary and procedural) are also raised.

In No. 762, *Johnson and Cassidy* v. *New Jersey*, petitioners have raised questions pertaining to self-incrimination through comment to the jury, severance, and improper prosecution argument and summation.

In No. 584, *California* v. *Stewart*, and No. 759, *Miranda* v. *Arizona*, in addition to the issues pertaining to the assistance of counsel, there are questions concerning the absence or adequacy of the warning given to the accused that he had a right to remain silent; these questions are likewise present in the *Vignera* case.

Rather, we wish to lay before the Court various considerations bearing on the role of *constitutional* decision-making in this complicated and contentious area. The inclusion in this group of cases of one (No. 761, *Westover* v. *United States*) from the federal judicial system underlines the distinction which, familiar though it may be, merits emphatic reiteration at this time. For in the *Westover* case (assuming that the unrelated evidentiary and procedural questions are not determinative) this Court must take account of federal statutory policy and its own responsibilities for supervision of the federal judicial process, and may find it wise to enunciate general federal rules derived from these sources.

In the other four cases, the Court should, we respectfully submit, give heed both to the limitations of the federal constitutional source and to the enduring impact and comparative inflexibility of constitutional decision-making. Accordingly, in the ensuing text, we invite the Court's attention to the historical content of the "Assistance of Counsel" clause; to the alarming paucity (soon, we hope, to be mitigated) of empirical data pertaining to the role of pre-arraignment interrogation in law enforcement and the probable effect of a general requirement that counsel be present at such interrogation; to the difficulties which courts and bar would encounter in meeting drastic new requirements of universal application; and to the importance of effective participation in the solution of these questions by legislative bodies, professional associations, and other official and private agencies importantly concerned.

A. Elements of the constitutional issue

The manner and extent to which the provisions of the Bill of Rights are "incorporated in" and made applicable to the States by the Fourteenth Amendment remains a matter of dispute within the Court.[1] In our approach to the

issues of these cases we assume, *arguendo,* that the Sixth Amendment guarantee of the right to the assistance of counsel applies in the same manner and with the same force to the States as to the Federal government, i.e., that in constitutional terms the right to counsel is the same under the Sixth and Fourteenth Amendments.[2] So regarded, some of the constitutional issues presented by these petitioners appear to be:

(a) At what point after the initial contact between a police officer and an individual in which the individual's knowledge of or connection with an actual or suspected crime is discussed does the individual have a constitutional right to the assistance of counsel?

(b) When the right described in (a) arises does the individual have a simultaneous or subsequent constitutional right to be effectively informed of a right to counsel?

(c) When the rights described in (a) and (b) have arisen and if the individual is unable, for financial or other reasons, to obtain counsel for himself, are the arresting authorities, either then or subsequently, constitutionally obligated to provide him with counsel?[3]

(d) Are statements made by an individual, at a time when his rights under (a), (b) or (c) have been violated, constitutionally inadmissible?

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[1] See the concurring opinion of Mr. Justice Harlan in *Ker* v. *California,* 374 U. S. 23, 44-45 (1963), and his dissenting opinion in *Griswold* v. *Connecticut,* 381 U. S. 479, 500. *Cf.* Mr. Justice Stewart's remark in *Massiah* v. *United States,* 377 U. S 201, 205: "Here we deal not with a state court conviction but with a federal case, to which the specific guaranty of the Sixth Amendment directly applies.

[2] There may, of course, be additional standards drawn from statutes or from this Court's judicial supervisory powers.

[3] It would appear to be established that the right to retain one's own counsel is at least somewhat more extensive than the right to have counsel supplied. *Chandler* v. *Fretag,* 348 U. S. 3, 9 (1954).

assure equal treatment for rich and poor. Granted that the protection of these rights is of the utmost importance, the fact remains that other values must also be weighed. The dimensions of the problem were described by Mr. Justice Jackson in his concurring opinion in *Watts* v. *Indiana*, 338 U. S. 49, 57 (1949) at 61-62:

> "I suppose no one would doubt that our Constitution and Bill of Rights, grounded in revolt against the arbitrary measures of George III and in the philosophy of the French Revolution, represent the maximum restrictions upon the power of organized society over the individual that are compatible with the maintenance of organized society itself. They were so intended and should be so interpreted. It cannot be denied that, even if construed as these provisions traditionally have been, they contain an aggregate of restrictions which seriously limit the power of society to solve such crimes as confront us in these cases. Those restrictions we should not for that reason cast aside, but that is good reason for indulging in no unnecessary expansion of them.
>
> I doubt very much if they require us to hold that the State may not take into custody and question one suspected reasonably of an unwitnessed murder. If it does, the people of this country must discipline themselves to seeing their police stand by helplessly while those suspected of murder prowl about unmolested. Is it a necessary price to pay for the fairness which we know as 'due process of law'? And if not a necessary one, should it be demanded by this Court? I do not know the ultimate answer to these questions; but, for the present, I should not increase the handicap on society."

C. The materials of decision

We have stressed the past, not because it provides the answers to the issues raised in these cases, but because it reveals a process and suggests an approach. As the peti-

tioner in *Miranda* rightly stresses, the constitutional right to the assistance of counsel has grown with the years and the times.

In short, the Court can not resolve these issues by seeking the original intention of those who framed the Bill of Rights or by verbal exegesis of the "Assistance of Counsel" clause, and must therefore find the primary material for decision in its appreciation of contemporary standards and circumstances. The temporal flexibility of general constitutional standards was remarked by Mr. Justice McKenna as early as 1910 in *Weems* v. *United States*, 217 U. S. 349, 373:

> "Time works changes, brings into existence new conditions and purposes. Therefore a principle to be vital must be capable of wider application than the mischief which gave it birth. This is particularly true of constitutions."

Commenting on this passage nearly half a century later, Chief Justice Warren, in *Trop* v. *Dulles*, 356 U. S. 86 (1958), wrote (at 100-101):

> "The Court recognized in that [the *Weems*] case that the words of the [Eighth] Amendment are not precise, and that their scope is not static. The Amendment must draw its meaning from the evolving standards of decency that mark the progress of maturing society."

These considerations apply to the Due Process Clause of the Fourteenth Amendment quite as much as to the Eighth Amendment[1] and their present import, we think, is both plain and of great moment. Since the Court is not here bound by history or verbal logic, the constitutional

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[1] At a later point in his opinion in the *Weems* case, Mr. Justice McKenna applied these generalizations directly to the Fourteenth Amendment (217 U. S. at 374).

standard may be applied with great flexibility, giving full weight to the bearing of contemporary empirical evidence of the need for and probable effect of the changes here sought.

These changes are not uniformly outlined, but in all these cases the defendants seek the establishment of a rule, to become effective at some point during pre-arraignment interrogation, at which the arrestee must either waive, obtain, or be provided with counsel, on pain of exclusion from evidence of any statement made in the absence of counsel. In No. 761 (*Westover*, Br. p. 34), petitioner would draw that line at the moment of custody; in No. 759 (*Miranda*, Br. p. 30), when interrogation begins; in No. 760 (*Vignera*, Br., pp. 10, 37-38) when the "accusatory" stage has been reached.

Under any of these proposals, it seems clear that the consequences would be:

(a) great reduction or virtual elimination of pre-arraignment interrogation of arrestees; or

(b) provision of counsel on a vast scale for arrestees, most of whom are indigent; or

(c) both (a) and (b) in varying degrees and unpredictable ratios.

We do not suggest that the statement of these consequences establishes them as undesirable. But we do suggest that they are of such a nature that further empirical investigation and analysis are necessary as a basis for general rule-making whether judicial or legislative. As was stated by Mr. Justice Black, dissenting in *Jackson* v. *Denno*, 378 U. S. 368 (1964) at 403 (commenting on the rule there adopted by the Court in line with the suggestions of commentators):

"None of these commentators appears to have gathered factual data to support his thesis, nor does it

appear that their arguments are at all rooted in the actual trial of criminal cases. Theoretical contemplation is a highly valuable means of moving toward improved techniques in many fields, but it cannot wholly displace the knowledge that comes from the hard facts of everyday experience."

D. Available empirical evidence is insufficient for projecting and evaluating the consequences of adopting the exclusionary rules proposed in these cases

The constitutional requirements of fair criminal procedure newly enunciated by this Court in recent years have had their origin by statute or judicial decision in the several states. This Court has, to be sure, given these rules general application by making them of constitutional dimension, but it has not originated the substance of the rules themselves. For example, at the time of *Mapp* v. *Ohio*, 367 U. S. 643 (1963), well over a third of the states had already adopted the exclusionary rule for evidence obtained by unlawful means, and the trend was heavily in that direction.[1] At the time of *Gideon* v. *Wainwright*, *supra*, all but thirteen states had statutes requiring that counsel be provided at trial for the defense of indigent defendants in all felony cases, and in eight of those juris-

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[1] The rule barring the use at trial of evidence obtained by unreasonable search and seizure was first introduced into American jurisprudence in the State of Iowa (*State* v. *Sheridan*, 96 N. W. 730 [Ia. 1903]), several years before the Court applied the rule to federal courts in *Weeks* v. *United States*, 232 U. S. 283 (1914). After *Weeks*, although Iowa abandoned the rule, eighteen states had voluntarily adopted it by 1949 (see appendix in *Wolf* v. *Colorado*, 338 U. S. 25, 33-39). By 1960, with several states having adopted the rule subsequent to *Wolf*, the Court observed that "the movement towards exclusion has been halting but seemingly inexorable" (*Elkins* v. *United States*, 364 U. S. 206 at 219). In holding the rule applicable to the states in 1961, the Court referred directly to the experience of the states, particularly that of California (*Mapp* v. *Ohio*, 367 U. S. 643 at 650-653).

dictions counsel was in fact provided in felony cases.[1] At the time of *Griffin* v. *California*, 380 U. S. 609 (1965), all but six states barred comment upon a defendant's failure to testify at trial.[2]

In all these situations, accordingly, the probable consequences of the new constitutional rule were not a matter of speculation, for the rules were already in force on a non-constitutional basis in a large number of jurisdictions. This does not, of course, mean that debate over the merits of these rules had been stilled or that evaluation of their consequences was uniform. It was, however, clear prior to the constitutional decisions rendered in this Court that the substantive rules they embodied had already proved not only tolerable but preferable to their alternatives in many or most of the states, and the practical workings of the rules could thus be observed in the laboratories which the state and local systems furnished.

But such is not the case with the exclusionary rules proposed in the present cases. Only three states, to our knowledge, have adopted rules conditioning the admissibility of pre-arraignment statements on prior warnings to the defendant of his rights to remain silent and to consult counsel, and in these three states the rule is of very recent origin.[3] No state, so far as we know, has as yet established a system for the mandatory and universal provision of counsel for the indigent at the pre-arraignment stage.

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[1] See Brief for Petitioner in *Gideon* v. *Wainwright*, 372 U. S. 335, No. 155 Oct. Term 1962, p. 29; *cf.* Kamisar, *Equal Justice in the Gatehouses and Mansions of American Criminal Procedure*, *in* CRIMINAL JUSTICE IN OUR TIME, p. 92 n. 262 (U. Va. Press 1965).

[2] See *Tehan* v. *Shott*, —— U. S. ——, 34 U.S.L. Week 4095 at 4098 (January 19, 1966).

[3] See *People* v. *Dorado*, 398 P. 2d 361 (Calif. 1965); *People* v. *Neely*, 398 P. 2d 482 (Oregon 1965); *State* v. *Dufour*, 206 A. 2d 82 (R. I. 1965). In addition, the Pennsylvania Supreme Court has stated (*Commonwealth* v. *Negri*, 213 A. 2d 670, 672 [1965])

(Footnote continued on following page)

Since in these cases, therefore, empirical evidence of the consequences of the proposed rules based on experience from their actual operation is altogether lacking, it would seem especially important to seek evidence from other sources. One would want to know, if only in part, the answer to questions such as the following:

(a) How important is pre-arraignment questioning in the identification and apprehension of those subsequently convicted of crime?

(b) How important are pre-arraignment statements as evidence for the conviction of those accused?

(c) What would be the effect on the interrogation process of (1) previous warning of the right to remain silent; (2) previous informing of the right to assistance of counsel; (3) a requirement that counsel either be waived or be present?

(d) How, in practice, would counsel be made available at the pre-arraignment stage?

This kind of empirical data can, in fact, be obtained, and would be of great value, particularly if studied in relation to available evidence on the effectiveness of alternative means of achieving the same goals. The techniques of the social sciences have already proven to be of considerable assistance in developing a body of usable knowledge in other areas of the law, and in stimulating invaluable reform in those areas. The statistical studies of the Man-

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(Footnote continued from preceding page)
that that state would follow the ruling of the Third Circuit Court of Appeals in *United States ex rel. Russo* v. *New Jersey*, 351 F. 2d 429 (1965), where such a warning was held to be required, until further word from this Court. The State of Texas has long provided by statute (Tex. Code Cr. Proc. Art. 727), that a defendant's confession is excludable where he had not previously been warned of his right to remain silent; however, if the confession leads to confirming evidence both these "fruits" and the confession itself are admissible.

hattan Bail Project,[1] for example, have undoubtedly been greatly responsible for awakening the interest of both the bar and the public in thoroughgoing bail reform.[2]

But although empirical data bearing on the questions listed above may be obtainable, it has not as yet been obtained, at least in sufficient quantities to support a presumably enduring constitutional decision of nationwide application. We detail below several of the areas where both present facts and future prospects remain murky.

(1) *The importance of pre-arraignment questioning in law enforcement*

Police and prosecutorial authorities generally regard opportunity for sustained questioning of arrested suspects as essential for the maintenance of tolerable standards of efficiency in the apprehension and conviction of criminals. The validity of this view has been accepted and enunciated in various opinions and at various times by a number of the members of this Court, and on at least two occasions has commanded a majority. *Haynes* v. *Washington*, 373 U. S. 503, 515 (1963); *Crooker* v. *California*, 357 U. S. 433 (1958) at 440-441, in which the opinion of the Court remarks that elimination of police questioning would have a "devastating effect on law enforcement." See also *Cicenia* v. *Lagay*, 357 U. S. 504 at 509 (1958).[3]

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[1] See Ares, Rankin and Sturz, *The Manhattan Bail Project: An Interim Report on the Use of Pre-Trial Parole*, 38 N.Y.U.L. Rev. 67 (1963); Wald, *Pretrial Detention and Ultimate Freedom*, 39 N.Y.U.L. Rev. 631 (1964); Rankin, *The Effect of Pretrial Detention*, 39 N.Y.U.L. Rev. 641 (1964).

[2] See generally *Proceedings and Interim Report of the National Conference on Bail and Criminal Justice* (1965), esp. pp. xiii-xxxii (Interim Report, Apr. 1965) and pp. 6-17 (Address of Chief Justice Warren to the Opening Session of the Conference, May 27, 1964); *cf.* Paulsen, *Pre-Trial Release in the United States*, 66 Col. L. Rev. 109, 116-119, 122-125 (1966).

[3] There are other significant comments on the matter by members of this Court. See, *e.g.*, Mr. Justice Jackson's concurring opinion in *Watts* v. *Indiana*, 338 U. S. 49 (1949) at 58, and Mr. Justice Frankfurter's opinion in *Culombe* v. *Connecticut*, 367 U. S. 568 (1961) at 578-580, with citations to much of the voluminous literature on the question.

The authority of the decisions reached in the *Crooker* and *Cicenia* cases was questioned in *Escobedo* (378 U. S. 492), but not on the basis that the *Crooker* opinion's evaluation of police interrogation was unsound. Indeed, those members of the Court who dissented in the *Crooker* and *Cicenia* cases, and those who comprised the majority in the *Escobedo* case, have not based their conclusions on the premise that police interrogation of suspects is of little value in terms of law enforcement.

This favorable evaluation of police questioning has not gone unchallenged in recent months. Perhaps the most conservative recent estimate as to the value of confessions is that of Judge Nathan Sobel, who finds that confessions are used in less than 10 per cent of the criminal trials in Kings County, New York.[1] Judge Sobel's estimate has been sharply contradicted in several quarters, however, notably by New York County District Attorney Frank Hogan, who has noted that a recent study by his staff indicated that admissions had been made by 62 of 91 defendants in pending homicide cases.[2] Mr. Hogan added that "assistant prosecutors told him that 25 of these, or 27%, could not have been indicted at all if there were no confessions."[3]

Without venturing to pass judgment as between any of these estimates, we suggest that the extent to which confessions are used in evidence is not the only value of police interrogation. Often the questioning furnishes leads to other evidence, and no doubt there are many pre-arraignment admissions and confessions which are not offered at

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[1] N. Y. Law Journal, Nov. 15, 1965, p. 1, col. 6, p. 4, col. 5. Judge Sobel's statistics are based on a survey of the first 1,000 indictments filed in Kings County, New York, subsequent to January 7, 1965. As he acknowledges (*id.* p. 4, col. 5), this is a small sampling; it also gives no hint of the extent to which police questioning may have led to other evidence, or to the immediate release of a suspect.

[2] *N. Y. Herald Tribune*, Dec 2, 1965, p. 31.

[3] *Id.*

the trial because checking their contents led to sufficient independent proof.

Other available statistics indicate that confessions or admissions are made, and used, in quite a high percentage of cases. See, *e.g.*, *Supplementary Memorandum on Behalf of Respondents* in *Linkletter* v. *Walker* and *Angelet* v. *Fay*, Nos. 95 and 581, respectively, Oct. Term 1964 (statistical tables pp. 8-14, summarizing a study of the trial records of the last 100 persons executed for murder in New York prior to 1961, indicate that statements made to the police, after arrest, were introduced in the trials of 85 of those defendants); Barrett, *Police Practices and the Law—From Arrest to Release or Charge*, 50 Calif. L. Rev. 11, 35-44 (1962) (three month study of police performances in two California cities in 1960 showed that between 75 and 90% of all persons charged with crimes had given confessions after what the author terms "surprisingly short" periods of interrogation). The *amicus* brief of the National District Attorneys Association in the present cases presents similar statistics.

Another function of police questioning—perhaps even more important to the effective day to day administration of justice than the solution of a few major crimes—is that of screening cases where an arrest may well have been made upon probable cause but where a decision to charge cannot or should not be made without some further investigation by the police and some evaluation by the prosecutor of the circumstances of the arrest and the availability of admissible evidence. See Bator and Vorenberg, *Arrest, Detention, Interrogation and the Right to Counsel: Basic Problems and Possible Legislative Solutions*, 66 Col. L. Rev. 62, 68-70 (1966); LaFave, ARREST, 319-341 (1965). As Professors Bator and Vorenberg have pointed out, the problem of police questioning must be considered in the context of a going system of law enforcement. Bator and Vorenberg, *supra*, at 69. In any large metropolitan area, a great number of persons will be lawfully arrested for a wide

variety of reasons; routine preliminary questioning may well result in their release prior to the filing of any charge, or in the filing of less serious charges. *Id.*, at 69-70, see also Barrett, *supra*, at 31-35.

The California surveys which are the subject of Dean Barrett's study are particularly illuminating in this regard. They indicate that 28.5% of the persons arrested and booked for felonies in California in 1960 were released without the filing of a complaint; in an additional 21.6% of the cases the felony arrests eventually resulted in the filing of misdemeanor complaints. Barrett, *supra*, at 31-35. To the extent that such preliminary screening can be accomplished without subjecting the individual to coercive interrogation—and the available evidence indicates that coercive interrogation is not at all typical of police questioning[1]—it is obviously desirable both in terms of administrative efficiency and in terms of avoiding the unnecessary stigmatization of a person as one who has been charged with crime.

We recognize, of course, that the utility of police interrogation in law enforcement is not the only factor bearing on the issues presented by these cases. But if competing values must be considered, then it is necessary to have as accurate a gauge of their weight as is possible.

On that score, it must be recognized that our present knowledge is far from complete, as the conflicting estimates cited above amply demonstrate. Nevertheless, it is clear

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[1] See, *e.g.*, LaFave, *supra*, at 386, where the author observes that

> "In the great majority of in-custody interrogations observed [in the states of Michigan, Wisconsin and Kansas, in 1956 and 1957], the possibility of coercion appeared slight. In many instances the suspect is merely confronted with the evidence against him or with evidence inconsistent with his prior statements and is asked to give an explanation. Often he is just given an opportunity to admit to other outstanding offenses recited to him. Lengthy, continuous questioning is the exception rather than the rule. In practice the interrogating detective often terminates the questioning after a brief period to appear in court or to check upon statements already given by the suspect."

police may adopt one of two procedures. They may suggest the local public defender or Legal Aid Society and provide access to telephone communication. On the other hand, if the police are unwilling or unable to recommend such counsel, they will simply terminate the interrogation at that point."

Petitioner in *Vignera* does not share the taste of Westover for jails equipped with lawyers; the "automatic assignment of counsel at the station house", he declares (Br. p. 40), would be "an impractical solution and one which the police are ill-equipped to achieve". From this and other passages in the brief, it seems clear that counsel for Vignera is prepared to reckon with frequent terminations of interrogations when the "accusatory" point is reached.

Inasmuch as in the *Escobedo* case an Assistant State's Attorney was called to help frame and to record the confession (378 U. S. at 483), the Court was warranted in describing the process as "accusatory" rather then "investigatory." Yet it seems to us far from clear that the "accusatory-investigatory" comparison in *Escobedo* was intended as a test of general application in future cases, rather than merely as a description of the circumstances in the case at hand. The usefulness of the "accusatory" test has been recently questioned by the Court of Appeals for the Second Circuit, sitting *en banc*, in *United States* v. *Cone*, ——F. 2d —— (Nov. 22, 1965, slip opinion pp. 3391, at 3398-99):

> "It has been suggested that the process of questioning suspects may be dissected into 'investigatory' and 'accusatory' phases and that certain legal conclusions, such as whether the Sixth Amendment's right to counsel 'attaches' and requires that the suspect be advised of his rights to silence and counsel, should flow from a judicial finding that police questioning has passed beyond mere investigation. We do not consider this a realistic doctrine for most cases. It was not the job

of the agents questioning Cone, nor were they qualified to make nice decisions about the sufficiency of the evidence they possessed; nor could they at the time of arrest determine what charges should be formally made and against whom. Agents in hot pursuit of those whom they have reason to believe may be implicated in a crime which has just been discovered cannot be required 'on the spot' to decide difficult questions of the sufficiency and quantum of proof.

We think a judicial inquiry into whether the agents were still in the 'investigatory' stage when they arrested Cone, and whether what had started out as an investigation had reached the 'accusatory' stage when Cone was questioned immediately after his arrest, would serve no useful purpose. What may seem to be sufficient evidence at one stage of an investigation may become quite insufficient when those who have supplied information are themselves accused and become unavailable to the government as witnesses, as happened with Moser and Spencer in this very case. To make judicial assessment of the questioning process turn on whether questioning occurred when a case was no longer in the 'investigatory' stage and had entered the 'accusatory' stage would force police officers to make momentary and critical decisions so unrelated to the actualities of law enforcement that the entire police function might well be significantly undermined or demoralized."

It is true that in several recent decisions the "accusatory-investigatory" language of *Escobedo* has been used as a test.[1] Nevertheless, we share the doubts expressed in the Second Circuit. A typical police investigation may involve

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[1] *United States ex rel. Russo* v. *New Jersey*, 351 F. 2d 429 (3d Cir. 1965); *People* v. *Dorado*, 42 Cal. Reptr. 169, 398 P. 2d 361 (1965); *State* v. *Neely*, 239 Ore. 487, 398 P. 2d 482 (1965); *cf. State* v. *Dufour*, 206 A. 2d 87 (R. I. 1965).

the employment of a large number of detectives simultaneously searching for evidence, pursuing different leads, interviewing witnesses and suspects or possible suspects, and checking out alibis. The discovery of a single piece of evidence might focus suspicion on a single individual at any given point in time, yet not justify regarding him as an accused, particularly where there may not be enough evidence even to justify holding him in custody. Even where the case is a routine one, a determination of when an investigation has reached the accusatorial stage involves judgments which cannot easily be made even by courts acting after the fact, much less by a police officer who may be acting in extremely pressing circumstances.

In *United States ex rel. Russo* v. *New Jersey,* 351 F. 2d 429 (3rd Cir. 1965), the Court of Appeals for the Third Circuit, in ruling that the interrogation there involved had reached the "accusatory" stage, gave weight (351 F. 2d at 437) to the volume of independent evidence implicating Russo at the time he confessed. Petitioner in *Vignera* (Br. p. 16) endorses this as one of the indicia of the "accusatory" stage.

We find the implications of this troublesome, for it leads to the consequence that good detective work and the accumulation of independent evidence will operate to shorten rather than lengthen the permissible period of "investigatory" interrogation. Ordinarily the police utilize interrogation to confront a suspect with evidence of his implication in the crime, both to see whether he can offer credible exculpatory explanation, and to stimulate admissions if no such explanation can be given. But under the "accusatory" test as applied in the *Russo* case, the police face the prospect that the greater the reason for interrogation of the suspect, the less will be their right to do so, unless counsel is brought into the picture.

We have considered the several proposals and the tests not so much to study their intrinsic merits and demerits,

as to demonstrate their variety and imprecision, and indicate the numerous questions they suggest but do not resolve. These matters are, we believe, highly relevant to the constitutional dimension of these cases, for they argue strongly against "freezing" the pre-arraignment scope of the right to counsel at a time when analysis of the problem is still in its infancy.

F. Importance of non-constitutional decisional sources

In this brief, we have urged that the scope of the right to the assistance of counsel prior to arraignment presents problems which are not ripe for constitutional disposition. In support of this viewpoint, we have sought to draw the Court's attention to a number of aspects of the problem, where, we believe, empirical evidence is insufficient for definitive rule-making, and to the uncertainties still surrounding the specific proposals that have been made to extend the right to counsel into the prearraignment stage.

We would like to close this portion of the brief on an affirmative note, by pointing out that the Constitution is by no means the only tool for the solution of problems of criminal procedure and that legislatures, state courts and professional organizations are currently concerned and actively engaged with pre-arraignment questions including the right to counsel. Nor is the field devoid of ideas and proposals alternative to those urged by petitioners in the present cases.

Public and professional concern with police interrogation centers chiefly on the possibility of abusive, oppressive practices, both physical or psychological, that subject the arrestee to pressures which violate the policy if not the letter of the Fifth Amendment privilege against self-incrimination. Furnishing counsel is one but only one of many means of ensuring that the suspect has an opportu-

nity to make a responsible choice as to whether or not to incriminate himself. There are a wide variety of alternative means by which this goal might be met, including rules barring the use of any confession made to the police; or made to the police during a delay in bringing a suspect before a magistrate; or made by a suspect who has not been warned of his right to remain silent; or made after the suspect has been denied a requested opportunity to consult family or friends or a lawyer; or shown by an evaluation of the "totality of the circumstances" to have been physically or psychologically coerced.

These rules obviously could be employed in combination. Indeed, it appears that the draftsmen of the American Law Institute's proposed Model Code of Criminal Procedure have contemplated an exclusionary rule based on a combination of requirements, including precise time limitations on the length of custody for pre-arraignment questioning; a requirement that a suspect be informed that he is under no obligation to talk; proscriptions against incommunicado detention and against other potentially coercive practices; and a prohibition of any questioning in the absence of counsel once detention has extended beyond a specified period of a few hours, except where there has been an explicit consent to such questioning. See Bator and Vorenberg, *supra*, at 71-76.

We do not suggest that any one of these alternatives is necessarily preferable to the others, or would protect the individual's privilege against compulsory self-incrimination better than would a rule requiring the state to furnish counsel at the stationhouse. We do suggest that the states should have an adequate opportunity to develop alternative methods. It may well be that experience will show that the alternatives provide adequate protection against police coercion, while having a significantly less damaging effect on the detection and prevention of crime.

The complex problems in the area of pre-arraignment procedure[1] are particularly appropriate for solution by legislation rather than by judicial decision. As Judge Kaufman stated in *United States* v. *Drummond*, —— F. 2d —— (2d Cir., Dec. 2, 1965, slip opinion pp. 3425, 3444):

> "... our Constitution guarantees fundamental rights, not the utterance of some judicially-ordained shibboleth. A decision based on constitutional fiat, therefore, is not a desirable method for reaching an informed resolution of the pre-trial access to counsel problem. This is precisely the sort of question that can best be answered after the investigative, experimental, and interest-balancing methods of the legislature are utilized."

A legislature is not limited by the facts of a particular case, and can deal constructively with the problems of police questioning in the context of the broad range of problems which exist in the pre-arraignment area. Questions of permissible police conduct during questioning of a suspect obviously bear a close relationship to standards for initial stopping, arrest, search, and subsequent detention. A legislature, working within a broader framework, can adjust the interrelated portions of the process without rejecting the ultimate goals sought by the proponents of an exclusionary rule based on the right to counsel. In addition, a legislature can be more specific than a court; the precise language of a statute may provide for more effective guidance than a judicially created rule formulated on the facts of particular cases.

Large-scale scholarly efforts—most significantly the American Bar Association's project on minimum stand-

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[1] Judge Friendly, remarking upon the complexity of this subject, has noted that the ALI's partial preliminary draft on pre-arraignment procedure spreads over fifty pages. Friendly, *The Bill of Rights as a Code of Criminal Procedure*, 53 Calif. L. Rev. 929, 930 (1965).

ards of criminal justice and the drafting of a Model Code of Pre-Arraignment Procedure by the American Law Institute—are underway, and may be expected to provide a basis for constructive action by state legislatures and courts. Even if the states did not all promptly adopt new statutory rules in light of the ALI Model Code, the Code —and its offshoots in the states that used it as a model— would provide valuable guidelines for courts faced with recurring problems in this area. See Friendly, *loc. cit. supra*, at 929.

We do not think the Court need be concerned that the state courts will rest content with old precedents, or ignore the demands of changing times and standards. As we have already noted, in other areas of criminal procedure the Court's new constitutional pronouncements followed state court decisions which, in fact, formed an important part of the basis for this Court's decisions.

The same progressive tendency is manifest among the state courts that have dealt extensively with problems pertaining to the right to counsel. For example, this Court's two most controversial recent decisions—i.e., the *Massiah* and *Escobedo* cases—had previously been anticipated in closely comparable decisions in New York State. In *People* v. *Di Biasi*, 7 N. Y. 2d 544 (1960), the New York Court of Appeals reversed a conviction because, as in the *Massiah* case (1964), the defendant made a statement (received in evidence at his trial) after indictment and in the absence of counsel.[1] In *People* v. *Donovan*, 13 N. Y. 2d 148 (1963), the court reached the same result where, as in *Escobedo* (1964), the defendant, prior to arraignment, had been denied access to his retained counsel.[2]

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[1] In *People* v. *Meyer*, 11 N. Y. 2d 162 (1962), the same rule was applied to a statement made after arraignment but before indictment.

[2] The *Donovan* case was cited with approval in the *Escobedo* case, 378 U. S. at 486-87.

Very recently, in *People* v. *Gunner*, 15 N. Y. 2d 226 (1965), the court extended pre-arraignment rights to counsel considerably beyond the holding of the *Escobedo* case. In the *Gunner* case, the defendant had made pre-arraignment statements to the police both before and after a lawyer had informed the police that he represented Gunner and wished that no more statements be taken. The conviction was reversed because the statements made after the lawyer's request were received at the trial; two members of the Court would have ruled the earlier statements likewise excludable, because the defendant had not been warned of his rights. See also *People* v. *Friedlander*, 16 N. Y. 2d 48 (1965).

If some other states have not yet had occasion to pursue the questions, or have reaffirmed more limited concepts of the right to counsel, that is still an insufficient reason for this Court to enlarge the constitutional requirements. The opportunity for constructive and varied development is one of the great values of the federal system. To let pass an opportunity such as presently exists for the development by the states of workable rules in this area of strong conflicting values would do great disservice to the principles of federalism and, we suggest, to the healthy development of criminal procedure in the United States.

II

New exclusionary rules limiting the admissibility of pre-arraignment statements should not be applied retroactively.

No. 762, *Johnson and Cassidy* v. *New Jersey*, is a proceeding for post-conviction relief in which petitioners contend that their pre-arraignment incriminatory statements, received in evidence against them at trial, were constitutionally inadmissible under the principles subsequently enunciated in the *Escobedo* case. The Supreme Court of New Jersey affirmed the denial of their applica-

tion, ruling that the *Escobedo* case established new rules of constitutional due process which should not be applied retroactively.[1]

In their brief (at pp. 32-34) in No. 762, the petitioners reject the conclusion below that *Escobedo* established new rules of constitutional law, and contend that the case therefore involves no problem of retroactivity. As *amici curiae*, we express no opinion on that question. Assuming, however, that this Court should agree with the New Jersey court's analysis of *Escobedo*, the problem of retroactivity must then be faced, as it also must in the event new exclusionary rules are to be established in the present or subsequent cases.

The Court has made it clear in two recent cases that not all new constitutional rules must be applied retroactively; rather the merits and demerits of retrospectivity must be weighed with respect to each case, by looking to the nature, purpose, and effect of the new rule, the reliance placed upon the previously existing rule, and the effect upon the administration of justice of a retroactive application of the new rule. *Linkletter* v. *Walker*, 381 U. S. 618, 628-29, 636 (1965); *Tehan* v. *Shott*, —— U. S. ——, 34 U.S.L. Week 4095, 4096 (Jan. 19, 1966). We submit that an examination of these considerations in the context of an exclusionary rule limiting the admissibility of pre-trial statements makes it amply clear that no such rule should be applied retroactively so as to vitiate a final conviction.

A. The state judicial systems and state law enforcement officials have justifiably placed great reliance on past decisions of this Court establishing voluntariness as the sole criterion for admissibility of a pre-arraignment statement.

There can be no doubt that over the course of years there has been extensive and justifiable reliance by the

[1] Other issues, unrelated to those discussed in this brief, are also raised by petitioners in No. 762.

state judicial systems upon this Court's decisions establishing voluntariness as the criterion for determining the admissibility of a pre-trial statement of an accused. Indeed, the Court had specifically held that the introduction of incriminating statements obtained in the absence of counsel—even after the defendant had clearly become the focus of a police investigation and had requested counsel—was no constitutional bar to a valid judgment where the statements were not involuntary. *Crooker* v. *California*, 357 U. S. 443 (1958); see also *Cicenia* v. *Lagay*, 357 U. S. 504 (1957); *Culombe* v. *Connecticut*, 367 U. S. 568, 588-602 (1961); *Brown* v. *Allen*, 344 U. S. 443, 474-476 (1953); *Stroble* v. *California*, 343 U. S. 181, 196-198 (1952); *Gallegos* v. *Nebraska*, 342 U. S. 55, 64-68 (1951).

As recently as 1963, the Court reiterated the well established rule that the admissibility of a pre-trial statement depended on its voluntariness, in a case where it held simply that the absence of a warning of a right to silence, delay in arraignment, and lack of opportunity to consult with counsel were factors involved in an assessment of voluntariness. *Haynes* v. *Washington*, 373 U. S. 503, 510-511 (1963). For this Court now to apply a new exclusionary rule retroactively, without regard to the voluntariness of challenged statements, would be to hold that the state courts should not have admitted evidence which this Court had plainly told them was admissible. *Cf. Linkletter* v. *Walker*, *supra* at 637; *Tehan* v. *Shott*, *supra* at 4096-4098.

The reliance of the police and prosecutors is also significant. A District Attorney naturally prepares his case on the basis of what this Court tells him is the applicable law. At least prior to the decision in *Escobedo*, the only federal constitutional bar to the admissibility of a defendant's pre-arraignment statement was involuntariness—if his statement was voluntary, it was admissible. The police, too, must have relied upon the many decisions holding that the relevant criterion was voluntariness. Certainly they

of the *Mapp* exclusionary rule. What is perhaps even more significant is the fact that such statements, or their fruits, are most apt to have been used in prosecutions for violent, frequently unwitnessed crimes, such as murder, manslaughter, rape, kidnapping and robbery. The individuals convicted of these crimes are the ones who would be most likely to reap the benefits of retroactive application of a new rule in this area.[1]

The pre-trial statements of the defendants were introduced at the trials of 85 of the last 100 persons executed in New York State prior to 1962.[2] It is certainly reasonable to suppose that a similarly high percentage of incriminatory statements was introduced at other trials for serious crimes. Few indeed are the cases in which such statements were made in the presence of counsel or after consultation with counsel. The persons who had been convicted at trials at which such statements were used would, by hypothesis, receive the benefit of retroactive application regardless of the fact that they were convicted fairly under the law as it stood at the time of the trial, despite the reliability of the adjudication of guilt, and irrespective of the voluntariness of their statements.

Application of any new exclusionary rule to convictions which became final prior to the change in the law would, of course, afford significant advantages to the convicted

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[1] Some idea of the impact upon old convictions of these serious crimes may be gained from the statistics presented to this Court last year by the New York Attorney General and the National District Attorneys Association in connection with the cases involving the retroactivity of the *Mapp* exclusionary rule. See text at p. 25, *supra*. As of June 30, 1964, some 13,869 persons were imprisoned in New York for felony convictions; of these, 4,543 were imprisoned pursuant to convictions had prior to January 1, 1961. Over 50% of those imprisoned for over 3½ years—2,607 of the total, of 4,543—had been convicted of murder, manslaughter, kidnapping, rape or robbery. See Supplementary Memorandum on Behalf of Respondents in *Linkletter* v. *Walker* (No. 95, Oct. Term 1965) and *Angelet* v. *Fay* (No. 578, Oct. Term 1965) at page 4.

[2] Supplementary Memorandum (*supra*, n. 1) at pp. 8-14.

individual who sought to take advantage of the new rule via an application for post-conviction relief. Both on collateral attack and, if that succeeded, upon retrial of the case, the passage of time—with the consequent dimming of memories, death or departure of witnesses, and loss of relevant records—would inevitably work to the accused's advantage. See, *e.g.*, *Tehan* v. *Shott*, *supra* at 4099; *Linkletter* v. *Walker*, *supra* at 637-638; *United States ex rel. Angelet* v. *Fay*, 381 U. S. 65 (1965); *United States* v. *Sobell*, 314 F. 2d 314, 325 (2d Cir.), cert. denied 374 U. S. 857 (1963); Bator, *Finality in the Criminal Law and Federal Habeas Corpus for State Prisoners*, 76 Harv. L. Rev. 441, 478 (1963). As Judge *Friendly* observed in writing for a unanimous Court in the *Sobell* case, *supra* at 325:

> "collateral attack can come at any time. Yet normally it is quite academic to talk of a new trial ten or fifteen years after the event; in most cases to direct one after such an interval is in practical result to order a release from further punishment, although the defendant does not even contend that he is entitled to that relief from the courts."

(2) *Retroactive application of a new rule would impair the future development of progressive solutions to the difficult problems of criminal procedure*

The recent decisions of this Court with respect to the admissibility of pre-trial statements made in the absence of counsel have been founded substantially on the prior development of similar rules by the state courts, particularly the New York Court of Appeals. See *Massiah* v. *United States*, 377 U. S. 201 at 204-205 (1964) and *Escobedo* v. *Illinois*, 378 U. S. 478 at 486-487 (1964).[1]

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[1] The *Massiah* decision noted some 10 New York decisions, most notably *People* v. *Waterman*, 9 N. Y. 2d 561 (1961); *People* v.

(Footnote continued on following page)

It seems certain, however, that one reason why the state courts have exercised their powers broadly in establishing new exclusionary rules is because of their expectation that the newly enunciated rules would affect relatively few past cases—indeed, only those in which the direct appellate process had not yet been exhausted. The New York Court of Appeals, for example, has declined to apply its new rules retroactively.[1] See *People* v. *Howard*, 12 N. Y. 2d 65 (1962), *cert. denied* 374 U. S. 840 (1963); *People* v. *Dash*, 16 N. Y. 2d 493 (1965). Similarly, the California Supreme Court, one of the few state courts which has interpreted the *Escobedo* decision as requiring a warning of a right to consult counsel and to have counsel provided, even in the absence of a request, has declined to apply its new rule retroactively. Compare *People* v. *Dorado*, 42 Cal. Reptr. 169, 398 P. 2d 361 (1965) with *In re Lopez*, 42 Cal. Reptr. 188, 398 P. 2d 380 (1965).

Significantly, the progressive New York rules were all developed in cases where appropriate and timely objections were made at trial to the use of the statement in question. If collateral attack were to be made broadly

(Footnote continued from preceding page)

Rodriguez, 11 N. Y. 2d 279 (1962); *People* v. *Meyer*, 11 N. Y. 2d 162 (1962); and *People* v. *DiBiasi*, 7 N. Y. 2d 544 (1960). The *Escobedo* opinion relied on *People* v. *Donovan*, 13 N. Y. 2d 148 (1963). This Court has also relied heavily on state court decisions in developing the exclusionary rule barring the use at trial of illegally seized evidence. See *Mapp* v. *Ohio*, 367 U. S. 643 at 651-653 (1963).

[1] Significantly, New York has long allowed post-conviction relief for a claim that a conviction was obtained in the absence of counsel. See, *e.g.*, *Matter of Bojinoff* v. *People*, 299 N. Y. 145 (1949). The New York courts thus recognize the great distinction which exists between the case where a defendant has been deprived of the assistance of counsel at trial and the case where a defendant who has had the assistance of counsel at trial later seeks to take advantage of a change in the rules governing the admissibility of evidence. Even though the change may have enlarged the right to counsel at a pre-trial stage, the New York courts will not permit collateral attack in the latter case.

available for claims based on a new exclusionary rule in the confession area, it is to be expected that concepts of trial strategy would be adjusted accordingly. Surely the incentive of defense counsel to challenge an existing rule of law in a developing area would be lessened—a different course could be pursued at trial and, as in the *Johnson* case now before the Court (No. 762), a constitutional challenge could later be made on collateral attack.

Both the lessened likelihood of challenge to existing rules and the spectre of further retroactive effects could be expected to inhibit state appellate courts—and perhaps also the federal courts, which would be flooded with applications from federal prisoners (28 U.S.C. § 2255) and state prisoners (28 U.S.C. § 2241)—from engaging in future constructive decision-making in the area of criminal procedure.

(3) Retroactivity of a new exclusionary rule would impair the ability of the state judicial legal systems to provide post-conviction relief for those individuals whose present incarceration truly amounts to "intolerable restraint"

It would certainly seem that under established principles of comity and exhaustion of state remedies, the state courts would be given the first opportunity to consider a claim for post-conviction relief which is based upon a new exclusionary rule. *Cf.* 28 U.S.C. § 2254; *Case* v. *Nebraska*, 381 U. S. 336 (1965). Clearly, however, the retroactive application of a new exclusionary rule would impose tremendous strains upon the bench and bar in all of the states —very possibly to the detriment of the individuals whose claims for post-conviction relief are more deserving under established principles of criminal justice.

The kinds of claims which have historically been recognized as warranting post-conviction relief are those which go to the fairness of the trial process itself, and which

raise genuine doubt as to the reliability of the adjudication of guilt.[1] The absence of counsel at trial (*Gideon* v. *Wainwright*, 372 U. S. 335 [1963]); the denial of opportunity to appeal (*Griffin* v. *California*, 351 U. S. 12 [1956]; *Eskridge* v. *Washington*, 357 U. S. 214 [1958]; *Douglas* v. *California*, 372 U. S. 356 [1963]); the use of an involuntary confession (*Reck* v. *Pate*, 367 U. S. 443 [1961]; *Fay* v. *Noia*, 372 U. S. 391 [1963]); the use of an unfair and unreliable procedure for testing voluntariness (*Jackson* v. *Denno*, 378 U. S. 368 [1964]); the knowing use of perjured testimony (*Mooney* v. *Holohan*, 294 U. S. 103 [1935]); and trial under conditions of mob domination or inflammatory publicity (*Moore* v. *Dempsey*, 261 U. S. 86 [1923]; *Irwin* v. *Dowd*, 359 U. S. 394 [1959]), fall into this category. These are the kinds of cases in which it can truly be said that continued imprisonment is intolerable (*cf. Fay* v. *Noia*, *supra* at 401-02, 441); where a defendant has really been afforded "no process of law".[2] These are the cases in which the judgment was, in effect, void *ab initio*, and thus subject to attack on federal habeas corpus just as any void judgment is always open to collateral attack. See *Fay* v. *Noia*, *supra*, at 423.

These are the kinds of cases for which many of the states have in the past sought to provide post-conviction relief—and for which, where previous remedies have proven too narrow, the states are now in the process of broadening the remedies under the impetus of the *Noia* decisions. These are the meritorious cases—the ones in which a hearing may well be warranted in order to de-

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[1] See Brief for Respondent in *Angelet* v. *Fay*, No. 578, Oct. Term 1964, pp. 18-20, 32-36; *cf.* Mishkin, *The High Court, The Great Writ, and the Due Process of Time and Law*, 79 Harv. L. Rev. 56 (1965); *Linkletter* v. *Walker*, *supra*, at 636 n. 20.

[2] Bator, *Finality in Criminal Law and Federal Habeas Corpus for State Prisoners*, 76 Harv. L. Rev. 441, 455-460 (1963). See also Traynor, *Mapp* v. *Ohio at Large in the Fifty States*, 1962 Duke L. J. 319, 340-341.

termine both the truth of the charges and the desirability of overlooking a prior failure to raise serious issues of both trial fairness and of reliability—upon which the states should be able to concentrate their resources. Indeed, that is clearly the purpose of the new statutes and court rules which have come into being since the *Noia* decision.[1] To require the states to afford collateral relief in a case where, by contrast, there is no doubt as to the factual reliability of a defendant's statement, where the statement was used at a trial at which the defendant had adequate counsel and at which existing law permitted its use, would be to establish an entirely new and unnecessary concept of collateral relief.

The result, inevitably, would be unending litigation by convicted prisoners, and a wholly unwarranted drain on legal resources—the time of judges, lawyers, court personnel and policemen, as well as public funds—at a time when these resources can be far more beneficially allocated to present responsibilities and to the pursuit of constructive legal developments in other areas of the criminal law.

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[1] Recent state statutes, court rules and judicial decisions are collected in the concurring opinion of Mr. Justice Brennan in *Case v. Nebraska*, 381 U. S. 336 (1965) at 340, 345-346, n. 8. See also Resolution XIV, *Post-Conviction Remedies*, adopted without opposition at the 59th Annual Meeting of the National Association of Attorneys Generals, held July 25-30, 1965. The resolution urges all states which have not yet done so "to adopt, either by statute or rule of court, post-conviction procedures which make it possible to adjudicate all claims of constitutional right properly presented by persons convicted in state court criminal proceedings."

CONCLUSION

For all the foregoing reasons we respectfully submit that the Court, in disposing of these cases, should observe the limiting principles of constitutional review which we have endeavored to set forth.

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Respectfully submitted,

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We dealt with certain phases of this problem recently in *Escobedo* v. *Illinois*, 378 U. S. 478 (1964). There, as in the four cases before us, law enforcement officials took the defendant into custody and interrogated him in a police station for the purpose of obtaining a confession. The police did not effectively advise him of his right to remain silent or of his right to consult with his attorney. Rather, they confronted him with an alleged accomplice who accused him of having perpetrated a murder. When the defendant denied the accusation and said "I didn't shoot Manuel, you did it," they handcuffed him and took him to an interrogation room. There, while handcuffed and standing, he was questioned for four hours until he confessed. During this interrogation, the police denied his request to speak to his attorney, and they prevented his retained attorney, who had come to the police station, from consulting with him. At his trial, the State, over his objection, introduced the confession against him. We held that the statements thus made were constitutionally inadmissible.

This case has been the subject of judicial interpretation and spirited legal debate since it was decided two years ago. Both state and federal courts, in assessing its implications, have arrived at varying conclusions.[1] A wealth of scholarly material has been written tracing its ramifications and underpinnings.[2] Police and prose-

[1] Compare *United States* v. *Childress*, 347 F. 2d 448 (C. A. 7th Cir. 1965) with *Collins* v. *Beto*, 348 F. 2d 823 (C. A. 5th Cir. 1965). Compare *People* v. *Dorado*, 62 Cal. 2d 350, 398 P. 2d 361, 42 Cal. Rptr. 169 (1964) with *People* v. *Hartgraves*, 31 Ill. 2d 375, 202 N. E. 2d 33 (1964).

[2] See, *e. g.*, Enker and Elsen, Counsel for the Suspect: *Massiah* v. *United States* and *Escobedo* v. *Illinois*, 49 Minn. L. Rev. 47 (1964); Herman, The Supreme Court and Restrictions on Police Interrogations, 25 Ohio St. L. J. 449 (1964); Kamisar, Equal Justice in the Gatehouses and Mansions of American Criminal Procedure, in Criminal Justice in Our Time (1965); Dowling, Escobedo and

cutor have speculated on its range and desirability.[3] We granted certiorari in these cases, 382 U. S. 924, 925, 937, in order further to explore some facets of the problems, thus exposed, of applying the privilege against self-incrimination to in-custody interrogation, and to give

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Beyond: The Need for a Fourteenth Amendment Code of Criminal Procedure, 56 J. Crim. L., C. & P. S. 156 (1965).

The complex problems also prompted discussions by jurists. Compare Bazelon, Law, Morality and Civil Liberties, 12 U. C. L. A. L. Rev. 13 (1964), with Friendly, The Bill of Rights as a Code of Criminal Procedure, 53 Calif. L. Rev. 929 (1965).

[3] For example, the Los Angeles Police Chief stated that "If the police are required . . . to . . . establish that the defendant was apprised of his constitutional guarantees of silence and legal counsel prior to the uttering of any admission or confession, and that he intelligently waived these guarantees . . . a whole Pandora's box is opened as to under what circumstances . . . can a defendant intelligently waive these rights. . . . Allegations that modern criminal investigation can compensate for the lack of a confession or admission in every criminal case is totally absurd!" Parker, 40 L. A. Bar. Bull. 603, 607, 642 (1965). His prosecutorial counterpart, District Attorney Younger, stated that "[I]t begins to appear that many of these seemingly restrictive decisions are going to contribute directly to a more effective, efficient and professional level of law enforcement." L. A. Times, Oct. 2, 1965, p. 1. The former Police Commissioner of New York, Michael J. Murphy, stated of *Escobedo:* "What the Court is doing is akin to requiring one boxer to fight by Marquis of Queensbury rules while permitting the other to butt, gouge and bite." N. Y. Times, May 14, 1965, p. 39. The former United States Attorney for the District of Columbia, David C. Acheson, who is presently Special Assistant to the Secretary of the Treasury (for Enforcement), and directly in charge of the Secret Service and the Bureau of Narcotics, observed that "Prosecution procedure has, at most, only the most remote causal connection with crime. Changes in court decisions and prosecution procedure would have about the same effect on the crime rate as an aspirin would have on a tumor of the brain." Quoted in Herman, *supra*, n. 2, at 500, n. 270. Other views on the subject in general are collected in Weisberg, Police Interrogation of Arrested Persons: A Skeptical View, 52 J. Crim. L., C. & P. S., 21 (1961).

concrete constitutional guidelines for law enforcement agencies and courts to follow.

We start here, as we did in *Escobedo*, with the premise that our holding is not an innovation in our jurisprudence, but is an application of principles long recognized and applied in other settings. We have undertaken a thorough re-examination of the *Escobedo* decision and the principles it announced, and we reaffirm it. That case was but an explication of basic rights that are enshrined in our Constitution—that "No person . . . shall be compelled in any criminal case to be a witness against himself," and that "the accused shall . . . have the Assistance of Counsel"—rights which were put in jeopardy in that case through official overbearing. These precious rights were fixed in our Constitution only after centuries of persecution and struggle. And in the words of Chief Justice Marshall, they were secured "for ages to come and . . . designed to approach immortality as nearly as human institutions can approach it," *Cohens* v. *Virginia*, 6 Wheat. 264, 387 (1821).

Over 70 years ago, our predecessors on this Court eloquently stated:

> "The maxim *nemo tenetur seipsum accusare* had its origin in a protest against the inquisitorial and manifestly unjust methods of interrogating accused persons, which has long obtained in the continental system, and, until the expulsion of the Stuarts from the British throne in 1688, and the erection of additional barriers for the protection of the people against the exercise of arbitrary power, was not uncommon even in England. While the admissions or confessions of the prisoner, when voluntarily and freely made, have always ranked high in the scale of incriminating evidence, if an accused person be asked to explain his apparent connection with a crime under investigation, the ease with which the

questions put to him may assume an inquisitorial character, the temptation to press the witness unduly, to browbeat him if he be timid or reluctant, to push him into a corner, and to entrap him into fatal contradictions, which is so painfully evidenced in many of these earlier state trials, notably in those of Sir Nicholas Throckmorton, and Udal, the Puritan minister, made the system so odious as to give rise to a demand for its total abolition. The change in the English criminal procedure in that particular seems to be founded upon no statute and no judicial opinion, but upon a general and silent acquiescence of the courts in a popular demand. But, however adopted, it has become firmly embedded in English, as well as in American jurisprudence. So deeply did the inequities of the ancient system impress themselves upon the minds of the American colonists that the States, with one accord, made a denial of the right to question an accused person a part of their fundamental law, so that a maxim, which in England was a mere rule of evidence, became clothed in this country with the impregnability of a constitutional enactment." *Brown* v. *Walker*, 161 U. S. 591, 596–597 (1896).

In stating the obligation of the judiciary to apply these constitutional rights, this Court declared in *Weems* v. *United States*, 217 U. S. 349, 373 (1910):

". . . our contemplation cannot be only what has been but of what may be. Under any other rule a constitution would indeed be as easy of application as it would be deficient in efficacy and power. Its general principles would have little value and be converted by precedent into impotent and lifeless formulas. Rights declared in words might be lost in reality. And this has been recognized. The

meaning and vitality of the Constitution have developed against narrow and restrictive construction."

This was the spirit in which we delineated, in meaningful language, the manner in which the constitutional rights of the individual could be enforced against overzealous police practices. It was necessary in *Escobedo*, as here, to insure that what was proclaimed in the Constitution had not become but a "form of words," *Silverthorne Lumber Co.* v. *United States*, 251 U. S. 385, 392 (1920), in the hands of government officials. And it is in this spirit, consistent with our role as judges, that we adhere to the principles of *Escobedo* today.

Our holding will be spelled out with some specificity in the pages which follow but briefly stated it is this: the prosecution may not use statements, whether exculpatory or inculpatory, stemming from custodial interrogation of the defendant unless it demonstrates the use of procedural safeguards effective to secure the privilege against self-incrimination. By custodial interrogation, we mean questioning initiated by law enforcement officers after a person has been taken into custody or otherwise deprived of his freedom of action in any significant way.[4] As for the procedural safeguards to be employed, unless other fully effective means are devised to inform accused persons of their right of silence and to assure a continuous opportunity to exercise it, the following measures are required. Prior to any questioning, the person must be warned that he has a right to remain silent, that any statement he does make may be used as evidence against him, and that he has a right to the presence of an attorney, either retained or appointed. The defendant may waive effectuation of these rights, provided the waiver is made voluntarily, knowingly and intelligently. If, however, he indicates in any manner and at any stage of the

[4] This is what we meant in *Escobedo* when we spoke of an investigation which had focused on an accused.

process that he wishes to consult with an attorney before speaking there can be no questioning. Likewise, if the individual is alone and indicates in any manner that he does not wish to be interrogated, the police may not question him. The mere fact that he may have answered some questions or volunteered some statements on his own does not deprive him of the right to refrain from answering any further inquiries until he has consulted with an attorney and thereafter consents to be questioned.

I.

The constitutional issue we decide in each of these cases is the admissibility of statements obtained from a defendant questioned while in custody and deprived of his freedom of action. In each, the defendant was questioned by police officers, detectives, or a prosecuting attorney in a room in which he was cut off from the outside world. In none of these cases was the defendant given a full and effective warning of his rights at the outset of the interrogation process. In all the cases, the questioning elicited oral admissions, and in three of them, signed statements as well which were admitted at their trials. They all thus share salient features—incommunicado interrogation of individuals in a police-dominated atmosphere, resulting in self-incriminating statements without full warnings of constitutional rights.

An understanding of the nature and setting of this in-custody interrogation is essential to our decisions today. The difficulty in depicting what transpires at such interrogations stems from the fact that in this country they have largely taken place incommunicado. From extensive factual studies undertaken in the early 1930's, including the famous Wickersham Report to Congress by a Presidential Commission, it is clear that police violence and the "third degree" flourished at that time.[5]

[5] See, for example, IV National Commission on Law Observance and Enforcement, Report on Lawlessness in Law Enforcement (1931)

In a series of cases decided by this Court long after these studies, the police resorted to physical brutality—beatings, hanging, whipping—and to sustained and protracted questioning incommunicado in order to extort confessions.[6] The 1961 Commission on Civil Rights found much evidence to indicate that "some policemen still resort to physical force to obtain confessions," 1961 Comm'n on Civil Rights Rep., Justice, pt. 5, 17. The use of physical brutality and violence is not, unfortunately, relegated to the past or to any part of the country. Only recently in Kings County, New York, the police brutally beat, kicked and placed lighted cigarette butts on the back of a potential witness under interrogation for the purpose of securing a statement incriminating a third party. *People* v. *Portelli*, 15 N. Y. 2d 235, 205 N. E. 2d 857, 257 N. Y. S. 2d 931 (1965).[7]

[Wickersham Report]; Booth, Confessions and Methods Employed in Procuring Them, 4 So. Calif. L. Rev. 83 (1930); Kauper, Judicial Examination of the Accused—A Remedy for the Third Degree, 30 Mich L. Rev. 1224 (1932). It is significant that instances of third-degree treatment of prisoners almost invariably took place during the period between arrest and preliminary examination. Wickersham Report, at 169; Hall, The Law of Arrest in Relation to Contemporary Social Problems, 3 U. Chi. L. Rev. 345, 357 (1936). See also Foote, Law and Police Practice: Safeguards in the Law of Arrest, 52 Nw. U. L. Rev. 16 (1957).

[6] *Brown* v. *Mississippi*, 297 U. S. 278 (1936); *Chambers* v. *Florida*, 309 U. S. 227 (1940); *Canty* v. *Alabama*, 309 U. S. 629 (1940); *White* v. *Texas*, 310 U. S. 530 (1940); *Vernon* v. *Alabama*, 313 U. S. 547 (1941); *Ward* v. *Texas*, 316 U. S. 547 (1942); *Ashcraft* v. *Tennessee*, 322 U. S. 143 (1944); *Malinski* v. *New York*, 324 U. S. 401 (1945); *Leyra* v. *Denno*, 347 U. S. 556 (1954). See also *Williams* v. *United States*, 341 U. S. 97 (1951).

[7] In addition, see *People* v. *Wakat*, 415 Ill. 610, 114 N. E. 2d 706 (1953); *Wakat* v. *Harlib*, 253 F. 2d 59 (C. A. 7th Cir. 1958) (defendant suffering from broken bones, multiple bruises and injuries sufficiently serious to require eight months' medical treatment after being manhandled by five policemen); *Kier* v. *State*, 213 Md. 556, 132 A. 2d 494 (1957) (police doctor told accused, who was

The examples given above are undoubtedly the exception now, but they are sufficiently widespread to be the object of concern. Unless a proper limitation upon custodial interrogation is achieved—such as these decisions will advance—there can be no assurance that practices of this nature will be eradicated in the foreseeable future. The conclusion of the Wickersham Commission Report, made over 30 years ago, is still pertinent:

> "To the contention that the third degree is necessary to get the facts, the reporters aptly reply in the language of the present Lord Chancellor of England (Lord Sankey): 'It is not admissible to do a great right by doing a little wrong. . . . It is not sufficient to do justice by obtaining a proper result by irregular or improper means.' Not only does the use of the third degree involve a flagrant violation of law by the officers of the law, but it involves also the dangers of false confessions, and it tends to make police and prosecutors less zealous in the search for objective evidence. As the New York prosecutor quoted in the report said, 'It is a short cut and makes the police lazy and unenterprising.' Or, as another official quoted remarked: 'If you use your fists, you

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strapped to a chair completely nude, that he proposed to take hair and skin scrapings from anything that looked like blood or sperm from various parts of his body); *Bruner* v. *People*, 113 Col. 194, 156 P. 2d 111 (1945) (defendant held in custody over two months, deprived of food for 15 hours, forced to submit to a lie detector test when he wanted to go to the toilet); *People* v. *Matlock*, 51 Cal. 2d 682, 336 P. 2d 505 (1959) (defendant questioned incessantly over an evening's time, made to lie on cold board and to answer questions whenever it appeared he was getting sleepy). Other cases are documented in American Civil Liberties Union, Illinois Division, Secret Detention by the Chicago Police (1959); Pott, The Preliminary Examination and "The Third Degree," 2 Baylor L. Rev. 131 (1950); Sterling, Police Interrogation and the Psychology of Confession, 14 J. Pub. L. 25 (1965).

> are not so likely to use your wits.' We agree with the conclusion expressed in the report, that 'The third degree brutalizes the police, hardens the prisoner against society, and lowers the esteem in which the administration of justice is held by the public.'" IV National Commission on Law Observance and Enforcement, Report on Lawlessness in Law Enforcement (1931), 5.

Again we stress that the modern practice of in-custody interrogation is psychologically rather than physically oriented. As we have stated before, "Since *Chambers* v. *Florida*, 309 U. S. 227, this Court has recognized that coercion can be mental as well as physical, and that the blood of the accused is not the only hallmark of an unconstitutional inquisition." *Blackburn* v. *Alabama*, 361 U. S. 199, 206 (1960). Interrogation still takes place in privacy. Privacy results in secrecy and this in turn results in a gap in our knowledge as to what in fact goes on in the interrogation rooms. A valuable source of information about present police practices, however, may be found in various police manuals and texts which document procedures employed with success in the past, and which recommend various other effective tactics.[8] These

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[8] The manuals quoted in the text following are the most recent and representative of the texts currently available. Material of the same nature appears in Kidd, Police Interrogation (1940); Mulbar, Interrogation (1951); Dienstein, Technics for the Crime Investigator (1952), 97–115. Studies concerning the observed practices of the police appear in LaFave, Arrest: The Decision To Take a Suspect Into Custody (1965), 244–437, 490–521; LaFave, Detention for Investigation by the Police: An Analysis of Current Practices, 1962 Wash. U. L. Q. 331; Barrett, Police Practices and the Law—From Arrest to Release or Charge, 50 Calif L. Rev. 11 (1962); Sterling, *supra*, n. 7, at 47–65.

texts are used by law enforcement agencies themselves as guides.[9] It should be noted that these texts professedly present the most enlightened and effective means presently used to obtain statements through custodial interrogation. By considering these texts and other data, it is possible to describe procedures observed and noted around the country.

The officers are told by the manuals that the "principal psychological factor contributing to a successful interrogation is *privacy*—being alone with the person under interrogation." [10] The efficacy of this tactic has been explained as follows:

> "If at all practicable, the interrogation should take place in the investigator's office or at least in a room of his own choice. The subject should be deprived of every psychological advantage. In his own home he may be confident, indignant, or recalcitrant. He is more keenly aware of his rights and

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[9] The methods described in Inbau and Reid, Criminal Interrogation and Confessions (1962), are a revision and enlargement of material presented in three prior editions of a predecessor text, Lie Detection and Criminal Interrogation (3d ed. 1953). The authors and their associates are officers of the Chicago Police Scientific Crime Detection Laboratory and have had extensive experience in writing, lecturing and speaking to law enforcement authorities over a 20-year period. They say that the techniques portrayed in their manuals reflect their experiences and are the most effective psychological stratagems to employ during interrogations. Similarly, the techniques described in O'Hara, Fundamentals of Criminal Investigation (1959), were gleaned from long service as observer, lecturer in police science, and work as a federal criminal investigator. All these texts have had rather extensive use among law enforcement agencies and among students of police science, with total sales and circulation of over 44,000.

[10] Inbau and Reid, *supra*, at 1.

presses the subject with the apparent fairness of his interrogator." [20] After this psychological conditioning, however, the officer is told to point out the incriminating significance of the suspect's refusal to talk:

> "Joe, you have a right to remain silent. That's your privilege and I'm the last person in the world who'll try to take it away from you. If that's the way you want to leave this, O. K. But let me ask you this. Suppose you were in my shoes and I were in yours and you called me in to ask me about this and I told you, 'I don't want to answer any of your questions.' You'd think I had something to hide, and you'd probably be right in thinking that. That's exactly what I'll have to think about you, and so will everybody else. So let's sit here and talk this whole thing over." [21]

Few will persist in their initial refusals to talk, it is said, if this monologue is employed correctly.

In the event that the subject wishes to speak to a relative or an attorney, the following advice is tendered:

> "[T]he interrogator should respond by suggesting the subject first tell the truth to the interrogator himself rather than get anyone else involved in the matter. If the request is for an attorney, the interrogator may suggest that the subject save himself or his family the expense of any such professional service, particularly if he is innocent of the offense under investigation. The interrogator may also add, 'Joe, I'm only looking for the truth, and if you're telling the truth, that's it. You can handle this by yourself.' " [22]

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[20] Inbau and Reid, *supra*, at 111.

[21] *Ibid.*

[22] Inbau and Reid, *supra*, at 112.

From these representative samples of interrogation techniques, the setting prescribed by the manuals and observed in practice becomes clear. In essence, it is this: To be alone with the subject is essential to prevent distraction and to deprive him of any outside support. The aura of confidence in his guilt undermines his will to resist. He merely confirms the preconceived story the police seek to have him describe. Patience and persistence, at times relentless questioning, are employed. To obtain a confession, the interrogator must "patiently maneuver himself or his quarry into a position from which the desired object may be obtained." [23] When normal procedures fail to produce the needed result, the police may resort to deceptive stratagems such as giving false legal advice. It is important to keep the subject off balance, for example, by trading on his insecurity about himself or his surroundings. The police then persuade, trick, or cajole him out of exercising his constitutional rights.

Even without employing brutality, the "third degree" or the specific stratagems described above, the very fact of custodial interrogation exacts a heavy toll on individual liberty and trades on the weakness of individuals.[24]

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[23] Inbau and Reid, Lie Detection and Criminal Interrogation (3d ed. 1953), 185.

[24] Interrogation procedures may even give rise to a false confession. The most recent conspicuous example occurred in New York, in 1964, when a Negro of limited intelligence confessed to two brutal murders and a rape which he had not committed. When this was discovered, the prosecutor was reported as saying: "Call it what you want—brain-washing, hypnosis, fright. They made him give an untrue confession. The only thing I don't believe is that Whitmore was beaten." N. Y. Times, Jan. 28, 1965, p. 1, col. 5. In two other instances, similar events had occurred. N. Y. Times, Oct. 20, 1964, p. 22, col. 1; N. Y. Times, Aug. 24, 1965, p. 1, col. 1. In general, see Borchard, Convicting the Innocent (1932); Frank and Frank, Not Guilty (1957).

This fact may be illustrated simply by referring to three confession cases decided by this Court in the Term immediately preceding our *Escobedo* decision. In *Townsend* v. *Sain*, 372 U. S. 293 (1963), the defendant was a 19-year-old heroin addict, described as a "near mental defective," *id.*, at 307–310. The defendant in *Lynumn* v. *Illinois*, 372 U. S. 528 (1963), was a woman who confessed to the arresting officer after being importuned to "cooperate" in order to prevent her children from being taken by relief authorities. This Court similarly reversed the conviction of a defendant in *Haynes* v. *Washington*, 373 U. S. 503 (1963), whose persistent request during his interrogation was to phone his wife or attorney.[25] In other settings, these individuals might have exercised their constitutional rights. In the incommunicado police-dominated atmosphere, they succumbed.

In the cases before us today, given this background, we concern ourselves primarily with this interrogation atmosphere and the evils it can bring. In No. 759, *Miranda* v. *Arizona*, the police arrested the defendant and took him to a special interrogation room where they secured a confession. In No. 760, *Vignera* v. *New York*, the defendant made oral admissions to the police after interrogation in the afternoon, and then signed an inculpatory statement upon being questioned by an assistant district attorney later the same evening. In No. 761, *Westover* v. *United States*, the defendant was

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[25] In the fourth confession case decided by the Court in the 1963 Term, *Fay* v. *Noia*, 372 U. S. 391 (1963), our disposition made it unnecessary to delve at length into the facts. The facts of the defendant's case there, however, paralleled those of his co-defendants, whose confessions were found to have resulted from continuous and coercive interrogation for 27 hours, with denial of requests for friends or attorney. See *United States* v. *Murphy*, 222 F. 2d 698 (C. A. 2d Cir., 1955) (Frank, J.); *People* v. *Bonino*, 1 N. Y. 2d 752, 135 N. E. 2d 51 (1956).

handed over to the Federal Bureau of Investigation by local authorities after they had detained and interrogated him for a lengthy period, both at night and the following morning. After some two hours of questioning, the federal officers had obtained signed statements from the defendant. Lastly, in No. 584, *California* v. *Stewart*, the local police held the defendant five days in the station and interrogated him on nine separate occasions before they secured his inculpatory statement.

In these cases, we might not find the defendants' statements to have been involuntary in traditional terms. Our concern for adequate safeguards to protect precious Fifth Amendment rights is, of course, not lessened in the slightest. In each of the cases, the defendant was thrust into an unfamiliar atmosphere and run through menacing police interrogation procedures. The potentiality for compulsion is forcefully apparent, for example, in *Miranda*, where the indigent Mexican defendant was a seriously disturbed individual with pronounced sexual fantasies, and in *Stewart*, in which the defendant was an indigent Los Angeles Negro who had dropped out of school in the sixth grade. To be sure, the records do not evince overt physical coercion or patented psychological ploys. The fact remains that in none of these cases did the officers undertake to afford appropriate safeguards at the outset of the interrogation to insure that the statements were truly the product of free choice.

It is obvious that such an interrogation environment is created for no purpose other than to subjugate the the individual to the will of his examiner. This atmosphere carries its own badge of intimidation. To be sure, this is not physical intimidation, but it is equally destructive of human dignity.[35] The current practice of incom-

[35] The absurdity of denying that a confession obtained under these circumstances is compelled is aptly portrayed by an example in Pro-

municado interrogation is at odds with one of our Nation's most cherished principles—that the individual may not be compelled to incriminate himself. Unless adequate protective devices are employed to dispel the compulsion inherent in custodial surroundings, no statement obtained from the defendant can truly be the product of his free choice.

From the foregoing, we can readily perceive an intimate connection between the privilege against self-incrimination and police custodial questioning. It is fitting to turn to history and precedent underlying the Self-Incrimination Clause to determine its applicability in this situation.

II.

We sometimes forget how long it has taken to establish the privilege against self-incrimination, the sources from which it came and the fervor with which it was defended. Its roots go back into ancient times.[27] Per-

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fessor Sutherland's recent article, Crime and Confession, 79 Harv. L. Rev. 21, 37 (1965):

"Suppose a well-to-do testatrix says she intends to will her property to Elizabeth. John and James want her to bequeath it to them instead. They capture the testatrix, put her in a carefully designed room, out of touch with everyone but themselves and their convenient 'witnesses,' keep her secluded there for hours while they make insistent demands, weary her with contradictions and finally induce her to execute the will in their favor. Assume that John and James are deeply and correctly convinced that Elizabeth is unworthy and will make base use of the property if she gets her hands on it, whereas John and James have the noblest and most righteous intentions. Would any judge of probate accept the will so procured as the 'voluntary' act of the testatrix?"

[27] Thirteenth century commentators found an analogue to the privilege grounded in the Bible. "To sum up the matter, the principle that no man is to be declared guilty on his own admission is a divine decree." Maimonides, Mishneh Torah (Code of Jewish Law), Book of Judges, Laws of the Sanhedrin, c. 18, ¶ 6, 3 Yale Judaica Series 52–53. See also Lamm, The Fifth Amendment and Its Equivalent in the Halakha, 5 Judaism 53 (Winter 1956).

haps the critical historical event shedding light on its origins and evolution was the trial of one John Lilburn, a vocal anti-Stuart Leveller, who was made to take the Star Chamber Oath in 1637. The oath would have bound him to answer to all questions posed to him on any subject. The Trial of John Lilburn and John Wharton, 3 How. St. Tr. 1315 (1637–1645). He resisted the oath and declaimed the proceedings, stating:

> "Another fundamental right I then contended for, was, that no man's conscience ought to be racked by oaths imposed, to answer to questions concerning himself in matters criminal, or pretended to be so." Heller and Davies, The Leveller Tracts 1647–1653 (1944), 454.

On account of the Lilburn Trial, Parliament abolished the inquisitorial Court of Star Chamber and went further in giving him generous reparation. The lofty principles to which Lilburn had appealed during his trial gained popular acceptance in England.[28] These sentiments worked their way over to the Colonies and were implanted after great struggle into the Bill of Rights.[29] Those who framed our Constitution and the Bill of Rights were ever aware of subtle encroachments on individual liberty. They knew that "illegitimate and unconstitutional practices get their first footing . . . by silent approaches and slight deviations from legal modes of procedure." *Boyd* v. *United States*, 116 U. S. 616, 635 (1886). The privilege was elevated to constitutional status and has always been "as broad as the mischief

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[28] See Morgan, The Privilege Against Self-Incrimination, 34 Minn. L. Rev. 1, 9–11 (1949); 8 Wigmore, Evidence (McNaughton rev., 1961), 289–295. See also Lowell, The Judicial Use of Torture, 11 Harv. L. Rev. 220, 290 (1897).

[29] See Pittman, The Colonial and Constitutional History of the Privilege Against Self-Incrimination in America, 21 Va. L. Rev. 763 (1935); *Ullmann* v. *United States*, 350 U. S. 422, 445–449 (1956) (Douglas, J., dissenting).

against which it seeks to guard." *Counselman* v. *Hitchcock*, 142 U. S. 547, 562 (1892). We cannot depart from this noble heritage.

Thus we may view the historical development of the privilege as one which groped for the proper scope of governmental power over the citizen. As a "noble principle often transcends its origins," the privilege has come rightfully to be recognized in part as an individual's substantive right, a "right to a private enclave where he may lead a private life. That right is the hallmark of our democracy." *United States* v. *Grunewald*, 233 F. 2d 556, 579, 581–582 (Frank, J., dissenting), rev'd, 353 U. S. 391 (1957). We have recently noted that the privilege against self-incrimination—the essential mainstay of our adversary system—is founded on a complex of values, *Murphy* v. *Waterfront Comm'n*, 378 U. S. 52, 55–57, n. 5 (1964); *Tehan* v. *Shott*, 382 U. S. 406, 414–415, n. 12 (1966). All these policies point to one overriding thought: the constitutional foundation underlying the privilege is the respect a government—state or federal—must accord to the dignity and integrity of its citizens. To maintain a "fair state-individual balance," to require the government "to shoulder the entire load," 8 Wigmore, Evidence (McNaughton rev., 1961), 317, to respect the inviolability of the human personality, our accusatory system of criminal justice demands that the government seeking to punish an individual produce the evidence against him by its own independent labors, rather than by the cruel, simple expedient of compelling it from his own mouth. *Chambers* v. *Florida*, 309 U. S. 227, 235–238 (1940). In sum, the privilege is fulfilled only when the person is guaranteed the right "to remain silent unless he chooses to speak in the unfettered exercise of his own will." *Malloy* v. *Hogan*, 378 U. S. 1, 8 (1964).

The question in these cases is whether the privilege is fully applicable during a period of custodial interroga-

tion. In this Court, the privilege has consistently been accorded a liberal construction. *Albertson* v. *SACB*, 382 U. S. 70, 81 (1965); *Hoffman* v. *United States*, 341 U. S. 479, 486 (1951); *Arndstein* v. *McCarthy*, 254 U. S. 71, 72–73 (1920); *Counselman* v. *Hitchock*, 142 U. S. 547, 562 (1892). We are satisfied that all the principles embodied in the privilege apply to informal compulsion exerted by law-enforcement officers during in-custody questioning. An individual swept from familiar surroundings into police custody, surrounded by antagonistic forces, and subjected to the techniques of persuasion described above cannot be otherwise than under compulsion to speak. As a practical matter, the compulsion to speak in the isolated setting of the police station may well be greater than in courts or other official investigations, where there are often impartial observers to guard against intimidation or trickery.[80]

This question, in fact, could have been taken as settled in federal courts almost 70 years ago, when, in *Bram* v. *United States*, 168 U. S. 532, 542 (1897), this Court held:

> "In criminal trials, in the courts of the United States, wherever a question arises whether a confession is incompetent because not voluntary, the issue is controlled by that portion of the Fifth Amendment . . . commanding that no person 'shall be compelled in any criminal case to be a witness against himself.'"

In *Bram*, the Court reviewed the British and American history and case law and set down the Fifth Amendment standard for compulsion which we implement today:

> "Much of the confusion which has resulted from the effort to deduce from the adjudged cases what

[80] Compare *Brown* v. *Walker*, 161 U. S. 596 (1896); *Quinn* v. *United States*, 349 U. S. 155 (1955).

would be a sufficient quantum of proof to show that a confession was or was not voluntary, has arisen from a misconception of the subject to which the proof must address itself. The rule is not that in order to render a statement admissible the proof must be adequate to establish that the particular communications contained in a statement were voluntarily made, but it must be sufficient to establish that the making of the statement was voluntary; that is to say, that from the causes, which the law treats as legally sufficient to engender in the mind of the accused hope or fear in respect to the crime charged, the accused was not involuntarily impelled to make a statement, when but for the improper influences he would have remained silent . . . ." 168 U. S., at 549. And see, *id.*, at 542.

The Court has adhered to this reasoning. In 1924, Mr. Justice Brandeis wrote for a unanimous Court in reversing a conviction resting on a compelled confession, *Wan* v. *United States*, 266 U. S. 1. He stated:

> "In the federal courts, the requisite of voluntariness is not satisfied by establishing merely that the confession was not induced by a promise or a threat. A confession is voluntary in law if, and only if, it was, in fact, voluntarily made. A confession may have been given voluntarily, although it was made to police officers, while in custody, and in answer to an examination conducted by them. But a confession obtained by compulsion must be excluded whatever may have been the character of the compulsion, and whether the compulsion was applied in a judicial proceeding or otherwise. *Bram* v. *United States*, 168 U. S. 532." 266 U. S., at 14–15.

In addition to the expansive historical development of the privilege and the sound policies which have nurtured

its evolution, judicial precedent thus clearly establishes its application to incommunicado interrogation. In fact, the Government concedes this point as well established in No. 761, *Westover* v. *United States*, stating: "We have no doubt . . . that it is possible for a suspect's Fifth Amendment right to be violated during in-custody questioning by a law-enforcement officer." [31]

Because of the adoption by Congress of Rule 5 (a) of the Federal Rules of Criminal Procedure, and this Court's effectuation of that Rule in *McNabb* v. *United States*, 318 U. S. 332 (1943), and *Mallory* v. *United States*, 354 U. S. 449 (1957), we have had little occasion in the past quarter century to reach the constitutional issues in dealing with federal interrogations. These supervisory rules, requiring production of an arrested person before a commissioner "without unnecessary delay" and excluding evidence obtained in default of that statutory obligation, were nonetheless responsive to the same considerations of Fifth Amendment policy that unavoidably face us now as to the States. In *McNabb*, 318 U. S., at 343–344, and in *Mallory*, 354 U. S., at 455–456, we recognized both the dangers of interrogation and the appropriateness of prophylaxis stemming from the very fact of interrogation itself.[32]

Our decision in *Malloy* v. *Hogan*, 378 U. S. 1 (1964), necessitates an examination of the scope of the privilege in state cases as well. In *Malloy*, we squarely held the

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[31] Brief for the United States, p. 28. To the same effect, see Brief for the United States, pp. 40–49, n. 44, *Anderson* v. *United States*, 318 U. S. 350 (1943); Brief for the United States, pp. 17–18, *McNabb* v. *United States*, 318 U. S. 332 (1943).

[32] Our decision today does not indicate in any manner, of course, that these rules can be disregarded. When federal officials arrest an individual, they must as always comply with the dictates of the congressional legislation and cases thereunder. See generally, Hogan and Snee, The McNabb-Mallory Rule: Its Rise, Rationale and Rescue, 47 Geo. L. J. 1 (1958).

unequivocal terms that he has the right to remain silent. For those unaware of the privilege, the warning is needed simply to make them aware of it—the threshold requirement for an intelligent decision as to its exercise. More important, such a warning is an absolute prerequisite in overcoming the inherent pressures of the interrogation atmosphere. It is not just the subnormal or woefully ignorant who succumb to an interrogator's imprecations, whether implied or expressly stated, that the interrogation will continue until a confession is obtained or that silence in the face of accusation is itself damning and will bode ill when presented to a jury.[37] Further, the warning will show the individual that his interrogators are prepared to recognize his privilege should he choose to exercise it.

The Fifth Amendment privilege is so fundamental to our system of constitutional rule and the expedient of giving an adequate warning as to the availability of the privilege so simple, we will not pause to inquire in individual cases whether the defendant was aware of his rights without a warning being given. Assessments of the knowledge the defendant possessed, based on infor-

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[37] See p. 16, *supra*. Lord Devlin has commented:

"It is probable that even today, when there is much less ignorance about these matters than formerly, there is still a general belief that you must answer all questions put to you by a policeman, or at least that it will be the worst for you if you do not." Devlin, The Criminal Prosecution in England (1958), 32.

In accord with this decision, it is impermissible to penalize an individual for exercising his Fifth Amendment privilege when he is under police custodial interrogation. The prosecution may not, therefore, use at trial the fact that he stood mute or claimed his privilege in the face of accusation. Cf. *Griffin* v. *California*, 380 U. S. 609 (1965); *Malloy* v. *Hogan*, 378 U. S. 1, 8 (1964); Comment, 31 U. Chi. L. Rev. 556 (1964); Developments in the Law—Confessions, 79 Harv. L. Rev. 935, 1041–1044 (1966). See also *Bram* v. *United States*, 168 U. S. 532, 562 (1897).

mation as to his age, education, intelligence, or prior contact with authorities, can never be more than speculation;[48] a warning is a clearcut fact. More important, whatever the background of the person interrogated, a warning at the time of the interrogation is indispensable to overcome its pressures and to insure that the individual knows he is free to exercise the privilege at that point in time.

The warning of the right to remain silent must be accompanied by the explanation that anything said can and will be used against the individual in court. This warning is needed in order to make him aware not only of the privilege, but also of the consequences of forgoing it. It is only through an awareness of these consequences that there can be any assurance of real understanding and intelligent exercise of the privilege. Moreover, this warning may serve to make the individual more acutely aware that he is faced with a phase of the adversary system—that he is not in the presence of persons acting solely in his interest.

The circumstances surrounding in-custody interrogation can operate very quickly to overbear the will of one merely made aware of his privilege by his interrogators. Therefore, the right to have counsel present at the interrogation is indispensable to the protection of the Fifth Amendment privilege under the system we delineate today. Our aim is to assure that the individual's right to choose between silence and speech remains unfettered throughout the interrogation process. A once-stated warning, delivered by those who will conduct the interrogation, cannot itself suffice to that end among those who most require knowledge of their rights. A mere

[48] Cf. *Betts* v. *Brady*, 316 U. S. 455 (1942), and the recurrent inquiry into special circumstances it necessitated. See generally, Kamisar, *Betts* v. *Brady* Twenty Years Later: The Right to Counsel and Due Process Values, 61 Mich. L. Rev. 219 (1962).

warning given by the interrogators is not alone sufficient to accomplish that end. Prosecutors themselves claim that the admonishment of the right to remain silent without more "will benefit only the recidivist and the professional." Brief for the National District Attorneys Association as *amicus curiae*, p. 14. Even preliminary advice given to the accused by his own attorney can be swiftly overcome by the secret interrogation process. Cf. *Escobedo* v. *Illinois*, 378 U. S. 478, 485, n. 5. Thus, the need for counsel to protect the Fifth Amendment privilege comprehends not merely a right to consult with counsel prior to questioning, but also to have counsel present during any questioning if the defendant so desires.

The presence of counsel at the interrogation may serve several significant subsidiary functions as well. If the accused decides to talk to his interrogators, the assistance of counsel can mitigate the dangers of untrustworthiness. With a lawyer present the likelihood that the police will practice coercion is reduced, and if coercion is nevertheless exercised the lawyer can testify to it in court. The presence of a lawyer can also help to guarantee that the accused gives a fully accurate statement to the police and that the statement is rightly reported by the prosecution at trial. See *Crooker* v. *California*, 357 U. S. 433, 443–448 (1958) (DOUGLAS, J., dissenting).

An individual need not make a pre-interrogation request for a lawyer. While such request affirmatively secures his right to have one, his failure to ask for a lawyer does not constitute a waiver. No effective waiver of the right to counsel during interrogation can be recognized unless specifically made after the warnings we here delineate have been given. The accused who does not know his rights and therefore does not make a request

may be the person who most needs counsel. As the California Supreme Court has aptly put it:

> "Finally, we must recognize that the imposition of the requirement for the request would discriminate against the defendant who does not know his rights. The defendant who does not ask for counsel is the very defendant who most needs counsel. We cannot penalize a defendant who, not understanding his constitutional rights, does not make the formal request and by such failure demonstrates his helplessness. To require the request would be to favor the defendant whose sophistication or status has fortuitously prompted him to make it." *People* v. *Dorado*, 62 Cal. 2d 338, 351, 398 P. 2d 361, 369–370, 42 Cal. Rptr. 169, 177–178 (1965) (Tobriner, J.).

In *Carnley* v. *Cochran*, 369 U. S. 506, 513 (1962), we stated: "[I]t is settled that where the assistance of counsel is a constitutional requisite, the right to be furnished counsel does not depend on a request." This proposition applies with equal force in the context of providing counsel to protect an accused's Fifth Amendment privilege in the face of interrogation.[39] Although the role of counsel at trial differs from the role during interrogation, the differences are not relevant to the question whether a request is a prerequisite.

Accordingly we hold that an individual held for interrogation must be clearly informed that he has the right to consult with a lawyer and to have the lawyer with him during interrogation under the system for protecting the privilege we delineate today. As with the warnings of the right to remain silent and that anything stated can be used in evidence against him, this warning is an absolute prerequisite to interrogation. No amount of

[39] See Herman, The Supreme Court and Restrictions on Police Interrogation, 25 Ohio St. L. J. 449, 480 (1964).

circumstantial evidence that the person may have been aware of this right will suffice to stand in its stead. Only through such a warning is there ascertainable assurance that the accused was aware of this right.

If an individual indicates that he wishes the assistance of counsel before any interrogation occurs, the authorities cannot rationally ignore or deny his request on the basis that the individual does not have or cannot afford a retained attorney. The financial ability of the individual has no relationship to the scope of the rights involved here. The privilege against self-incrimination secured by the Constitution applies to all individuals. The need for counsel in order to protect the privilege exists for the indigent as well as the affluent. In fact, were we to limit these constitutional rights to those who can retain an attorney, our decisions today would be of little significance. The cases before us as well as the vast majority of confession cases with which we have dealt in the past involve those unable to retain counsel.[40] While authorities are not required to relieve the accused of his poverty, they have the obligation not to take advantage of indigence in the administration of justice.[41] Denial

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[40] Estimates of 50–90% indigency among felony defendants have been reported. Pollock, Equal Justice in Practice, 45 Minn. L. Rev. 737, 738–739 (1961); Birzon, Kasanof and Forma, The Right to Counsel and the Indigent Accused in Courts of Criminal Jurisdiction in New York State, 14 Buff. L. Rev. 428, 433 (1965).

[41] See Kamisar, Equal Justice in the Gatehouses and Mansions of American Criminal Procedure, in Criminal Justice in Our Time (1965), 64–81. As was stated in the Report of the Attorney General's Committee on Poverty and the Administration of Federal Criminal Justice (1963), p. 9:

"When government chooses to exert its powers in the criminal area, its obligation is surely no less than that of taking reasonable measures to eliminate those factors that are irrelevant to just administration of the law but which, nevertheless, may occasionally affect determinations of the accused's liability or penalty. While govern-

of counsel to the indigent at the time of interrogation while allowing an attorney to those who can afford one would be no more supportable by reason or logic than the similar situation at trial and on appeal struck down in *Gideon* v. *Wainwright*, 372 U. S. 335 (1963), and *Douglas* v. *California*, 372 U. S. 353 (1963).

In order fully to apprise a person interrogated of the extent of his rights under this system then, it is necessary to warn him not only that he has the right to consult with an attorney, but also that if he is indigent a lawyer will be appointed to represent him. Without this additional warning, the admonition of the right to consult with counsel would often be understood as meaning only that he can consult with a lawyer if he has one or has the funds to obtain one. The warning of a right to counsel would be hollow if not couched in terms that would convey to the indigent—the person most often subjected to interrogation—the knowledge that he too has a right to have counsel present.[42] As with the warnings of the right to remain silent and of the general right to counsel, only by effective and express explanation to the indigent of this right can there be assurance that he was truly in a position to exercise it.[43]

Once warnings have been given, the subsequent procedure is clear. If the individual indicates in any man-

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ment may not be required to relieve the accused of his poverty, it may properly be required to minimize the influence of poverty on its administration of justice."

[42] Cf. *United States ex rel. Brown* v. *Fay*, 242 F. Supp. 273, 277 (D. C. S. D. N. Y. 1965); *People* v. *Witenski*, 15 N. Y. 2d 392, 207 N. E. 2d 358, 259 N. Y. S. 2d 413 (1965).

[43] While a warning that the indigent may have counsel appointed need not be given to the person who is known to have an attorney or is known to have ample funds to secure one, the expedient of giving a warning is too simple and the rights involved too important to engage in *ex post facto* inquiries into financial ability when there is any doubt at all on that score.

ner, at any time prior to or during questioning, that he wishes to remain silent, the interrogation must cease."[44] At this point he has shown that he intends to exercise his Fifth Amendment privilege; any statement taken after the person invokes his privilege cannot be other than the product of compulsion, subtle or otherwise. Without the right to cut off questioning, the setting of in-custody interrogation operates on the individual to overcome free choice in producing a statement after the privilege has been once invoked. If the individual states that he wants an attorney, the interrogation must cease until an attorney is present. At that time, the individual must have an opportunity to confer with the attorney and to have him present during any subsequent questioning. If the individual cannot obtain an attorney and he indicates that he wants one before speaking to police, they must respect his decision to remain silent.

This does not mean, as some have suggested, that each police station must have a "station house lawyer" present at all times to advise prisoners. It does mean, however, that if police propose to interrogate a person they must make known to him that he is entitled to a lawyer and that if he cannot afford one, a lawyer will be provided for him prior to any interrogation. If authorities conclude that they will not provide counsel during a reasonable period of time in which investigation in the field is carried out, they may do so without violating the person's Fifth Amendment privilege so long as they do not question him during that time.

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[44] If an individual indicates his desire to remain silent, but has an attorney present, there may be some circumstances in which further questioning would be permissible. In the absence of evidence of overbearing, statements then made in the presence of counsel might be free of the compelling influence of the interrogation process and might fairly be construed as a waiver of the privilege for purposes of these statements.

If the interrogation continues without the presence of an attorney and a statement is taken, a heavy burden rests on the Government to demonstrate that the defendant knowingly and intelligently waived his privilege against self-incrimination and his right to retained or appointed counsel. *Escobedo* v. *Illinois*, 378 U. S. 478, 490, n. 14. This Court has always set high standards of proof for the waiver of constitutional rights, *Johnson* v. *Zerbst*, 304 U. S. 458 (1938), and we re-assert these standards as applied to in-custody interrogation. Since the State is responsible for establishing the isolated circumstances under which the interrogation takes place and has the only means of making available corroborated evidence of warnings given during incommunicado interrogation, the burden is rightly on its shoulders.

An express statement that the individual is willing to make a statement and does not want an attorney followed closely by a statement could constitute a waiver. But a valid waiver will not be presumed simply from the silence of the accused after warnings are given or simply from the fact that a confession was in fact eventually obtained. A statement we made in *Carnley* v. *Cochran*, 369 U. S. 506, 516 (1962), is applicable here:

> "Presuming waiver from a silent record is impermissible. The record must show, or there must be an allegation and evidence which show, that an accused was offered counsel but intelligently and understandingly rejected the offer. Anything less is not waiver."

See also *Glasser* v. *United States*, 315 U. S. 60 (1942). Moreover, where in-custody interrogation is involved, there is no room for the contention that the privilege is waived if the individual answers some questions or gives

> rules of conduct that are commands to the citizen. In a government of laws, existence of the government will be imperilled if it fails to observe the law scrupulously. Our Government is the potent, the omnipresent teacher. For good or for ill, it teaches the whole people by its example. Crime is contagious. If the Government becomes a lawbreaker, it breeds contempt for law; it invites every man to become a law unto himself; it invites anarchy. To declare that in the administration of the criminal law the end justifies the means . . . would bring terrible retribution. Against that pernicious doctrine this Court should resolutely set its face." *Olmstead* v. *United States*, 277 U. S. 438, 485 (1928) (dissenting opinion).[49]

In this connection, one of our country's distinguished jurists has pointed out: "The quality of a nation's civilization can be largely measured by the methods it uses in the enforcement of its criminal law." [50]

If the individual desires to exercise his privilege, he has the right to do so. This is not for the authorities to decide. An attorney may advise his client not to talk to police until he has had an opportunity to investigate the case, or he may wish to be present with his client during any police questioning. In doing so an attorney is merely exercising the good professional judgment he has been taught. This is not cause for considering the attorney a menace to law enforcement. He is merely carrying out what he is sworn to do under his oath—to protect to the extent of his ability the rights of his

[49] In quoting the above from the dissenting opinion of Mr. Justice Brandeis we, of course, do not intend to pass on the constitutional questions involved in the *Olmstead* case.

[50] Schaefer, Federalism and State Criminal Procedure, 70 Harv. L. Rev. 1, 26 (1956).

client. In fulfilling this responsibility the attorney plays a vital role in the administration of criminal justice under our Constitution.

In announcing these principles, we are not unmindful of the burdens which law enforcement officials must bear, often under trying circumstances. We also fully recognize the obligation of all citizens to aid in enforcing the criminal laws. This Court, while protecting individual rights, has always given ample latitude to law enforcement agencies in the legitimate exercise of their duties. The limits we have placed on the interrogation process should not constitute an undue interference with a proper system of law enforcement. As we have noted, our decision does not in any way preclude police from carrying out their traditional investigatory functions. Although confessions may play an important role in some convictions, the cases before us present graphic examples of the overstatement of the "need" for confessions. In each case authorities conducted interrogations ranging up to five days in duration despite the presence, through standard investigating practices, of considerable evidence against each defendant.[51] Further examples are chronicled in our prior cases. See, *e. g.*, *Haynes* v. *Washington*, 373 U. S. 503, 518–519 (1963); *Rogers* v. *Richmond*, 365 U. S. 534, 541 (1961); *Malinski* v. *New York*, 324 U. S. 401, 402 (1945).[52]

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[51] Miranda, Vignera, and Westover were identified by eyewitnesses. Marked bills from the bank robbed were found in Westover's car. Articles stolen from the victim as well as from several other robbery victims were found in Stewart's home at the outset of the investigation.

[52] Dealing as we do here with constitutional standards in relation to statements made, the existence of independent corroborating evidence produced at trial is, of course, irrelevant to our decisions. *Haynes* v. *Washington*, 373 U. S. 503, 518–519 (1963); *Lynumn* v.

It is also urged that an unfettered right to detention for interrogation should be allowed because it will often redound to the benefit of the person questioned. When police inquiry determines that there is no reason to believe that the person has committed any crime, it is said, he will be released without need for further formal procedures. The person who has committed no offense, however, will be better able to clear himself after warnings, with counsel present than without. It can be assumed that in such circumstances a lawyer would advise his client to talk freely to police in order to clear himself.

Custodial interrogation, by contrast, does not necessarily afford the innocent an opportunity to clear themselves. A serious consequence of the present practice of the interrogation alleged to be beneficial for the innocent is that many arrests "for investigation" subject large numbers of innocent persons to detention and interrogation. In one of the cases before us, No. 584, *California* v. *Stewart*, police held four persons, who were in the defendant's house at the time of the arrest, in jail for five days until defendant confessed. At that time they were finally released. Police stated that there was "no evidence to connect them with any crime." Available statistics on the extent of this practice where it is condoned indicate that these four are far from alone in being subjected to arrest, prolonged detention, and interrogation without the requisite probable cause.[53]

Illinois, 372 U. S. 528, 537–538 (1963); *Rogers* v. *Richmond*, 365 U. S. 534, 541 (1961); *Blackburn* v. *Alabama*, 361 U. S. 199, 206 (1960).

[53] See, *e. g.*, Report and Recommendations of the Commissioner's Committee on Police Arrests for Investigation (1962); American Civil Liberties Union, Secret Detention by the Chicago Police (1959). An extreme example of this practice occurred in the District of Columbia in 1958. Seeking three "stocky" young Negroes who had robbed a restaurant, police rounded up 90 persons of that general description. Sixty-three were held overnight before being

Over the years the Federal Bureau of Investigation has compiled an exemplary record of effective law enforcement while advising any suspect or arrested person, at the outset of an interview, that he is not required to make a statement, that any statement may be used against him in court, that the individual may obtain the services of an attorney of his own choice and, more recently, that he has a right to free counsel if he is unable to pay.[54] A letter received from the Solicitor General in response to a question from the Bench makes it clear that the present pattern of warnings and respect for the

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released for lack of evidence. A man not among the 90 arrested was ultimately charged with the crime. Washington Daily News, January 21, 1958, p. 5, col. 1; Hearings before a Subcommittee of the Senate Judiciary Committee on H. R. 11477, S. 2970, S. 3325, and S. 3355 (July 1958), pp. 40, 78.

[54] In 1952, J. Edgar Hoover, Director of the Federal Bureau of Investigation, stated:

"Law enforcement, however, in defeating the criminal, must maintain inviolate the historic liberties of the individual. To turn back the criminal, yet, by so doing, destroy the dignity of the individual, would be a hollow victory.

"We can have the Constitution, the best laws in the land, and the most honest reviews by courts—but unless the law enforcement profession is steeped in the democratic tradition, maintains the highest in ethics, and makes its work a career of honor, civil liberties will continually—and without end—be violated . . . . The best protection of civil liberties is an alert, intelligent and honest law enforcement agency. There can be no alternative.

". . . Special Agents are taught that any suspect or arrested person, at the outset of an interview, must be advised that he is not required to make a statement and that any statement given can be used against him in court. Moreover, the individual must be informed that, if he desires, he may obtain the services of an attorney of his own choice."

Hoover, Civil Liberties and Law Enforcement: The Role of the FBI, 37 Iowa L. Rev. 175, 177–182 (1952).

rights of the individual followed as a practice by the FBI is consistent with the procedure which we delineate today. It states:

"At the oral argument of the above cause, MR. JUSTICE FORTAS asked whether I could provide certain information as to the practices followed by the Federal Bureau of Investigation. I have directed these questions to the attention of the Director of the Federal Bureau of Investigation and am submitting herewith a statement of the questions and of the answers which we have received.

"'(1) When an individual is interviewed by agents of the Bureau, what warning is given to him?

"'The standard warning long given by Special Agents of the FBI to both suspects and persons under arrest is that the person has a right to say nothing and a right to counsel, and that any statement he does make may be used against him in court. Examples of this warning are to be found in the *Westover* case at 342 F. 2d 685 (1965), and *Jackson* v. *U. S.*, 337 F. 2d 136 (1964), cert. den. 380 U. S. 985.

"'After passage of the Criminal Justice Act of 1964, which provides free counsel for Federal defendants unable to pay, we added to our instructions to Special Agents the requirement that any person who is under arrest for an offense under FBI jurisdiction, or whose arrest is contemplated following the interview, must also be advised of his right to free counsel if he is unable to pay, and the fact that such counsel will be assigned by the Judge. At the same time, we broadened the right to counsel warn-

ing to read counsel of his own choice, or anyone else with whom he might wish to speak.

"'(2) When is the warning given?

"'The FBI warning is given to a suspect at the very outset of the interview, as shown in the *Westover* case, cited above. The warning may be given to a person arrested as soon as practicable after the arrest, as shown in the *Jackson* case, also cited above, and in *U. S.* v. *Konigsberg*, 336 F. 2d 844 (1964), cert. den. 379 U. S. 930, 933, but in any event it must precede the interview with the person for a confession or admission of his own guilt.

"'(3) What is the Bureau's practice in the event that (a) the individual requests counsel and (b) counsel appears?

"'When the person who has been warned of his right to counsel decides that he wishes to consult with counsel before making a statement, the interview is terminated at that point, *Shultz* v. *U. S.*, 351 F. 2d 287 (1965). It may be continued, however, as to all matters *other* than the person's own guilt or innocence. If he is indecisive in his request for counsel, there may be some question on whether he did or did not waive counsel. Situations of this kind must necessarily be left to the judgment of the interviewing Agent. For example, in *Hiram* v. *U. S.*, 354 F. 2d 4 (1965), the Agent's conclusion that the person arrested had waived his right to counsel was upheld by the courts.

"'A person being interviewed and desiring to consult counsel by telephone must be permitted to do so, as shown in *Caldwell* v. *U. S.*, 351 F. 2d 459 (1965). When counsel appears in person, he is permitted to confer with his client in private.

"'(4) What is the Bureau's practice if the individual requests counsel, but cannot afford to retain an attorney?

"'If any person being interviewed after warning of counsel decides that he wishes to consult with counsel before proceeding further the interview is terminated, as shown above. FBI Agents do not pass judgment on the ability of the person to pay for counsel. They do, however, advise those who have been arrested for an offense under FBI jurisdiction, or whose arrest is contemplated following the interview, of a right to free counsel *if* they are unable to pay, and the availability of such counsel from the Judge.'" [55]

The practice of the FBI can readily be emulated by state and local enforcement agencies. The argument that the FBI deals with different crimes than are dealt with by state authorities does not mitigate the significance of the FBI experience.[56]

The experience in some other countries also suggests that the danger to law enforcement in curbs on interrogation is overplayed. The English procedure since 1912

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[55] We agree that the interviewing agent must exercise his judgment in determining whether the individual waives his right to counsel. Because of the constitutional basis of the right, however, the standard for waiver is necessarily high. And, of course, the ultimate responsibility for resolving this constitutional question lies with the courts.

[56] Among the crimes within the enforcement jurisdiction of the FBI are kidnaping, 18 U. S. C. § 1201 (1964 ed.), white slavery, 18 U. S. C. §§ 2421–2423 (1964 ed.), bank robbery, 18 U. S. C. § 2113 (1964 ed.), interstate transportation and sale of stolen property, 18 U. S. C. §§ 2311–2317 (1964 ed.), all manner of conspiracies, 18 U. S. C. § 371 (1964 ed.), and violations of civil rights, 18 U. S. C. §§ 241–242 (1964 ed.). See also 18 U. S. C. § 1114 (1964 ed.) (murder of officer or employee of the United States).

under the Judge's Rules is significant. As recently strengthened, the Rules require that a cautionary warning be given an accused by a police officer as soon as he has evidence that affords reasonable grounds for suspicion; they also require that any statement made be given by the accused without questioning by police.[37]

[37] [1964] Crim. L. Rev. 166–170. These Rules provide in part:

"II. As soon as a police officer has evidence which would afford reasonable grounds for suspecting that a person has committed an offence, he shall caution that person or cause him to be cautioned before putting to him any questions, or further questions, relating to that offence.

"The caution shall be in the following terms:

"'You are not obliged to say anything unless you wish to do so but what you say may be put into writing and given in evidence.'

"When after being cautioned a person is being questioned, or elects to make a statement, a record shall be kept of the time and place at which any such questioning or statement began and ended and of the persons present.

. . . . .

"(b) It is only in exceptional cases that questions relating to the offence should be put to the accused person after he has been charged or informed that he may be prosecuted.

. . . . .

"IV. All written statements made after caution shall be taken in the following manner:

"(a) If a person says that he wants to make a statement he shall be told that it is intended to make a written record of what he says.

"He shall always be asked whether he wishes to write down himself what he wants to say; if he says that he cannot write or that he would like someone to write it for him, a police officer may offer to write the statement for him . . . .

"(b) Any person writing his own statement shall be allowed to do so without any prompting as distinct from indicating to him what matters are material.

. . . . .

"(d) Whenever a police officer writes the statement, he shall take down the exact words spoken by the person making the statement, without putting any questions other than such as may be needed to

The right of the individual to consult with an attorney during this period is expressly recognized.[58]

The safeguards present under Scottish law may be even greater than in England. Scottish judicial decisions bar use in evidence of most confessions obtained through police interrogation.[59] In India, confessions made to police not in the presence of a magistrate have been ex-

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make the statement coherent, intelligible and relevant to the material matters: he shall not prompt him."

The prior Rules appear in Devlin, The Criminal Prosecution in England (1958), 137–141.

Despite suggestions of some laxity in enforcement of the Rules and despite the fact some discretion as to admissibility is invested in the trial judge, the Rules are a significant influence in the English criminal law enforcement system. See, *e. g.*, [1964] Crim. L. Rev., at 182; and articles collected in [1960] Crim. L. Rev., at 298–356.

[58] The introduction to the Judge's Rules states in part:

"These Rules do not affect the principles

"(c) That every person at any stage of an investigation should be able to communicate and consult privately with a solicitor. This is so even if he is in custody provided that in such a case no unreasonable delay or hindrance is caused to the processes of investigation or the administration of justice by his doing so . . . ." [1964] Crim. L. Rev., at 166–167.

[59] As stated by the Lord Justice General in *Chalmers* v. *H. M. Advocate*, [1954] Sess. Cas. 66, 78 (J. C.):

"The theory of our law is that at the stage of initial investigation the police may question anyone with a view to acquiring information which may lead to the detection of the criminal; but that, when the stage has been reached at which suspicion, or more than suspicion, has in their view centred upon some person as the likely perpetrator of the crime, further interrogation of that person becomes very dangerous, and, if carried too far, *e. g.*, to the point of extracting a confession by what amounts to cross-examination, the evidence of that confession will almost certainly be excluded. Once the accused has been apprehended and charged he has the statutory right to a private interview with a solicitor and to be brought before a magistrate with all convenient speed so that he may, if so advised, emit a declaration in presence of his solicitor under conditions which safeguard him against prejudice."

cluded by rule of evidence since 1872, at a time when it operated under British law.[60] Identical provisions appear in the Evidence Ordinance of Ceylon, enacted in 1895.[61] Similarly, in our country the Uniform Code of Military Justice has long provided that no suspect may be interrogated without first being warned of his right not to make a statement and that any statement he makes may be used against him.[62] Denial of the right to consult counsel during interrogation has also been proscribed by military tribunals.[63] There appears to have been no marked detrimental effect on criminal law enforcement in these jurisdictions as a result of these rules. Conditions of law enforcement in our country are sufficiently similar to permit reference to this experience as assurance that lawlessness will not result from warning an individual of his rights or allowing him to exercise them. Moreover, it is consistent with our legal system that we give at least as much protection to these rights as is given in the jurisdictions described. We deal in our country with rights grounded in a specific requirement of the Fifth Amendment of the Constitution,

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[60] "No confession made to a police officer shall be proved as against a person accused of any offence." Indian Evidence Act § 25

"No confession made by any person whilst he is in the custody of a police officer unless it be made in the immediate presence of a Magistrate, shall be proved as against such person." Indian Evidence Act, § 26. See 1 Ramaswami & Rajagopalan, Law of Evidence in India (1962), 553–569. To avoid any continuing effect of police pressure or inducement, the Indian Supreme Court has invalidated a confession made shortly after police brought a suspect before a magistrate, suggesting: "[I]t would, we think, be reasonable to insist upon giving an accused person at least 24 hours to decide whether or not to make a confession." *Sarwan Singh* v. *State of Punjab*, 44 All India Rep. 1957, Sup. Ct. 637, 644.

[61] 1 Legislative Enactments of Ceylon (1958), 211.

[62] 10 U. S. C. § 831 (b) (1964 ed.).

[63] *United States* v. *Rose*, 24 Court-Martial Reports 251 (1957); *United States* v. *Gunnels*, 23 Court-Martial Reports 354 (1957).

I said? I am telling you what the law of the State of New York is."

Vignera was found guilty of first degree robbery. He was subsequently adjudged a third-felony offender and sentenced to 30 to 60 years' imprisonment.[68] The conviction was affirmed without opinion by the Appellate Division, Second Department, 21 A. D. 2d 752, 252 N. Y. S. 2d 19, and by the Court of Appeals, also without opinion, 15 N. Y. 2d 970, 207 N. E. 2d 527, 259 N. Y. S. 2d 857, remittitur amended, 16 N. Y. 2d 614, 209 N. E. 2d 110, 261 N. Y. S. 2d 65. In argument to the Court of Appeals, the State contended that Vignera had no constitutional right to be advised of his right to counsel or his privilege against self-incrimination.

We reverse. The foregoing indicates that Vignera was not warned of any of his rights before the questioning by the detective and by the assistant district attorney. No other steps were taken to protect these rights. Thus he was not effectively apprised of his Fifth Amendment privilege or of his right to have counsel present and his statements are inadmissible.

No. 761. *Westover* v. *United States.*

At approximately 9:45 p. m. on March 20, 1963, petitioner, Carl Calvin Westover, was arrested by local police in Kansas City as a suspect in two Kansas City robberies. A report was also received from the FBI that he was wanted on a felony charge in California. The local authorities took him to a police station and placed him in a line-up on the local charges, and at about 11:45 p. m. he was booked. Kansas City police interrogated West-

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[68] Vignera thereafter successfully attacked the validity of one of the prior convictions, *Vignera* v. *Wilkins,* Civ. 9901 (D. C. W. D. N. Y. Dec. 31, 1961) (unreported), but was then resentenced as a second-felony offender to the same term of imprisonment as the original sentence. R. 31–33.

over on the night of his arrest. He denied any knowledge of criminal activities. The next day local officers interrogated him again throughout the morning. Shortly before noon they informed the FBI that they were through interrogating Westover and that the FBI could proceed to interrogate him. There is nothing in the record to indicate that Westover was ever given any warning as to his rights by local police. At noon, three special agents of the FBI continued the interrogation in a private interview room of the Kansas City Police Department, this time with respect to the robbery of a savings and loan association and a bank in Sacramento, California. After two or two and one-half hours, Westover signed separate confessions to each of these two robberies which had been prepared by one of the agents during the interrogation. At trial one of the agents testified, and a paragraph on each of the statements states, that the agents advised Westover that he did not have to make a statement, that any statement he made could be used against him, and that he had the right to see an attorney.

Westover was tried by a jury in federal court and convicted of the California robberies. His statements were introduced at trial. He was sentenced to 15 years' imprisonment on each count, the sentences to run consecutively. On appeal, the conviction was affirmed by the Court of Appeals for the Ninth Circuit. 342 F. 2d 684.

We reverse. On the facts of this case we cannot find that Westover knowingly and intelligently waived his right to remain silent and his right to consult with counsel prior to the time he made the statement.[89] At the

[89] The failure of defense counsel to object to the introduction of the confession at trial, noted by the Court of Appeals and emphasized by the Solicitor General, does not preclude our consideration of the issue. Since the trial was held prior to our decision in *Escobedo* and, of course, prior to our decision today making the

time the FBI agents began questioning Westover, he had been in custody for over 14 hours and had been interrogated at length during that period. The FBI interrogation began immediately upon the conclusion of the interrogation by Kansas City police and was conducted in local police headquarters. Although the two law enforcement authorities are legally distinct and the crimes for which they interrogated Westover were different, the impact on him was that of a continuous period of questioning. There is no evidence of any warning given prior to the FBI interrogation nor is there any evidence of an articulated waiver of rights after the FBI commenced their interrogation. The record simply shows that the defendant did in fact confess a short time after being turned over to the FBI following interrogation by local police. Despite the fact that the FBI agents gave warnings at the outset of their interview, from Westover's point of view the warnings came at the end of the interrogation process. In these circumstances an intelligent waiver of constitutional rights cannot be assumed.

We do not suggest that law enforcement authorities are precluded from questioning any individual who has been held for a period of time by other authorities and interrogated by them without appropriate warnings. A different case would be presented if an accused were taken into custody by the second authority, removed both in time and place from his original surroundings, and then adequately advised of his rights and given an opportunity to exercise them. But here the FBI interrogation was conducted immediately following the state interrogation in the same police station—in the same compelling surroundings. Thus, in obtaining a confession from West-

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objection available, the failure to object at trial does not constitute a waiver of the claim. See, *e. g.*, *United States ex rel. Angelet* v. *Fay*, 333 F. 2d 12, 16 (C. A. 2d Cir. 1964); aff'd, 381 U. S. 654 (1965). Cf. *Ziffrin, Inc.* v. *United States*, 318 U. S. 73, 78 (1943).

over the federal authorities were the beneficiaries of the pressure applied by the local in-custody interrogation. In these circumstances the giving of warnings alone was not sufficient to protect the privilege.

No. 584. *California* v. *Stewart.*

In the course of investigating a series of purse-snatch robberies in which one of the victims had died of injuries inflicted by her assailant, repondent, Roy Allen Stewart, was pointed out to Los Angeles police as the endorser of dividend checks taken in one of the robberies. At about 7:15 p. m., January 31, 1963, police officers went to Stewart's house and arrested him. One of the officers asked Stewart if they could search the house, to which he replied, "Go ahead." The search turned up various items taken from the five robbery victims. At the time of Stewart's arrest, police also arrested Stewart's wife and three other persons who were visiting him. These four were jailed along with Stewart and were interrogated. Stewart was taken to the University Station of the Los Angeles Police Department where he was placed in a cell. During the next five days, police interrogated Stewart on nine different occasions. Except during the first interrogation session, when he was confronted with an accusing witness, Stewart was isolated with his interrogators.

During the ninth interrogation session, Stewart admitted that he had robbed the deceased and stated that he had not meant to hurt her. Police then brought Stewart before a magistrate for the first time. Since there was no evidence to connect them with any crime, the police then released the other four persons arrested with him.

Nothing in the record specifically indicates whether Stewart was or was not advised of his right to remain silent or his right to counsel. In a number of instances,

however, the interrogating officers were asked to recount everything that was said during the interrogations. None indicated that Stewart was ever advised of his rights.

Stewart was charged with kidnapping to commit robbery, rape, and murder. At his trial, transcripts of the first interrogation and the confession at the last interrogation were introduced in evidence. The jury found Stewart guilty of robbery and first degree murder and fixed the penalty as death. On appeal, the Supreme Court of California reversed. 62 Cal. 2d 571, 400 P. 2d 97, 43 Cal. Rptr. 201. It held that under this Court's decision in *Escobedo*, Stewart should have been advised of his right to remain silent and of his right to counsel and that it would not presume in the face of a silent record that the police advised Stewart of his rights.[70]

We affirm.[71] In dealing with custodial interrogation, we will not presume that a defendant has been effectively apprised of his rights and that his privilege against self-incrimination has been adequately safeguarded on a record that does not show that any warnings have been given or that any effective alternative has been em-

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[70] Because of this disposition of the case, the California Supreme Court did not reach the claims that the confession was coerced by police threats to hold his ailing wife in custody until he confessed, that there was no hearing as required by *Jackson* v. *Denno*, 378 U. S. 368 (1964), and that the trial judge gave an instruction condemned by the California Supreme Court's decision in *People* v. *Morse*, 60 Cal. 2d 631, 388 P. 2d 33, 36 Cal. Rptr. 201 (1964).

[71] After certiorari was granted in this case, respondent moved to dismiss on the ground that there was no final judgment from which the State could appeal since the judgment below directed that he be retried. In the event respondent was successful in obtaining an acquittal on retrial, however, under California law the State would have no appeal. Satisfied that in these circumstances the decision below constituted a final judgment under 28 U. S. C. § 1257 (3) (1964 ed.), we denied the motion. 383 U. S. 903.

ployed. Nor can a knowing and intelligent waiver of these rights be assumed on a silent record. Furthermore, Stewart's steadfast denial of the alleged offenses through eight of the nine interrogations over a period of five days is subject to no other construction than that he was compelled by persistent interrogation to forgo his Fifth Amendment privilege.

Therefore, in accordance with the foregoing, the judgments of the Supreme Court of Arizona in No. 759, of the New York Court of Appeals in No. 760, and of the Court of Appeals for the Ninth Circuit in No. 761 are reversed. The judgment of the Supreme Court of California in No. 584 is affirmed.

It is so ordered.

SUPREME COURT OF THE UNITED STATES

Nos. 759, 760, 761 AND 584.—OCTOBER TERM, 1965.

Ernesto A. Miranda, Petitioner, 759 *v.* State of Arizona.	On Writ of Certiorari to the Supreme Court of the State of Arizona.
Michael Vignera, Petitioner, 760 *v.* State of New York.	On Writ of Certiorari to the Court of Appeals of the State of New York.
Carl Calvin Westover, Petitioner, 761 *v.* United States.	On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.
State of California, Petitioner, 584 *v.* Roy Allen Stewart.	On Writ of Certiorari to the Supreme Court of the State of California.

[June 13, 1966.]

MR. JUSTICE CLARK, dissenting in Nos. 759, 760, and 761, and concurring in result in No. 584.

It is with regret that I find it necessary to write in these cases. However, I am unable to join the majority because its opinion goes too far on too little, while my dissenting brethren do not go quite far enough. Nor can I agree with the Court's criticism of the present practices of police and investigatory agencies as to custodial interrogation. The materials it refers to as "police manuals" [1] are, as I read them, merely writings in this field by pro-

[1] *E. g.*, Inbau and Reid, Criminal Interrogation and Confessions (1962); O'Hara, Fundamentals of Criminal Interrogation (1956); Dienstein, Technics for the Crime Investigator (1952); Mulbar, Interrogation (1951); Kidd, Police Interrogation (1940).

fessors and some police officers. Not one is shown by the record here to be the official manual of any police department, much less in universal use in crime detection. Moreover, the examples of police brutality mentioned by the Court are rare exceptions to the thousands of cases that appear every year in the law reports.[2] The police agencies—all the way from municipal and state forces to the federal bureaus—are responsible for law enforcement and public safety in this country. I am proud of their efforts, which in my view are not fairly characterized by the Court's opinion.

I.

The *ipse dixit* of the majority has no support in our cases. Indeed, the Court admits that "we might not find the defendants' statements [here] to have been involuntary in traditional terms." *Ante*, p. —. In short, the Court has added more to the requirements that the accused is entitled to consult with his lawyer and that he must be given the traditional warning that he may remain silent and that anything that he says may be used against him. *Escobedo* v. *Illinois*, 378 U. S. 478, 490–491 (1964). Now, the Court fashions a constitutional rule that the police may engage in no custodial interrogation without additionally advising the accused that he has a right under the Fifth Amendment to the presence of counsel during interrogation and that, if he is without funds, that counsel will be furnished him. When at any point during an interrogation the accused seeks affirmatively or impliedly to invoke his rights to silence or counsel, interrogation must be forgone or postponed. The Court further holds that failure to follow the new procedures requires inexorably the exclusion of

[2] As developed by my Brother HARLAN, *post*, pp. —, —, such cases, with the exception of the long-discredited decision in *Bram* v. *United States*, 168 U. S. 532 (1897), were adequately treated in terms of due process.

any statement by the accused, as well as the fruits thereof. Such a strict constitutional specific inserted at the nerve center of crime detection may well kill the patient.[3] Since there is at this time a paucity of information and an almost total lack of empirical knowledge on the practical operation of requirements, truly comparable to those announced by the majority, I would be more restrained lest we go too far too fast.

II.

Custodial interrogation has long been recognized as "undoubtedly an essential tool in effective law enforce-

[3] The Court points to England, Scotland, Ceylon and India as having equally rigid rules. As my Brother HARLAN points out, *post*, pp. —, —, the Court is mistaken in this regard, for it overlooks counterbalancing prosecutorial advantages. Moreover, the requirements of the Federal Bureau of Investigation do not appear from the Solicitor General's letter, *ante*, pp. —, —, to be as strict as those imposed today in at least two respects: (1) The offer of counsel is articulated only as "a right to counsel"; nothing is said about a right to have counsel present at the custodial interrogation. (See also the examples cited by the Solicitor General, *Westover* v. *United States*, 342 F. 2d 684, 685 (1965) ("right to consult counsel"); *Jackson* v. *United States*, 337 F. 2d 136, 138 (1964) (accused "entitled to an attorney").) Indeed, the practice is that whenever the suspect "decides that he wishes to consult counsel before making a statement, the interview is terminated at that point . . . . When counsel appears in person, he is permitted to confer with his client in private." This clearly indicates that the FBI does not warn that counsel may be present during custodial interrogation. (2) The Solicitor General's letter states: "[T]hose who have been arrested for an offense under FBI jurisdiction, or whose arrest is contemplated following the interview, [are advised] of a right to free counsel *if* they are unable to pay, and the availability of such counsel from the Judge." So phrased, this warning does not indicate that the agent will secure counsel. Rather, the statement may well be interpreted by the suspect to mean that the burden is placed upon himself and that he may have counsel appointed only when brought before the judge or at trial—but not at custodial interrogation. As I view the FBI practice, it is not as broad as the one laid down today by the Court.

fold warning be given to a person in custody before he is questioned: namely, that he has a right to remain silent, that anything he says may be used against him, that he has a right to have present an attorney during the questioning, and that if indigent he has a right to a lawyer without charge. To forgo these rights, some affirmative statement of rejection is seemingly required, and threats, tricks, or cajolings to obtain this waiver are forbidden. If before or during questioning the suspect seeks to invoke his right to remain silent, interrogation must be forgone or cease; a request for counsel brings about the same result until a lawyer is procured. Finally, there are a miscellany of minor directives, for example, the burden of proof of waiver is on the State, admissions and exculpatory statements are treated just like confessions, withdrawal of a waiver is always permitted, and so forth.[1]

While the fine points of this scheme are far less clear than the Court admits, the tenor is quite apparent. The new rules are not designed to guard against police brutality or other unmistakably banned forms of coercion. Those who use third-degree tactics and deny them in court are equally able and destined to lie as skillfully about warnings and waivers. Rather, the thrust of the new rules is to negate all pressures, to reinforce the nervous or ignorant suspect, and ultimately to discourage any confession at all. The aim in short is toward "voluntariness" in a utopian sense, or to view it from a different angle, voluntariness with a vengeance.

To incorporate this notion into the Constitution requires a strained reading of history and precedent and a disregard of the very pragmatic concerns that alone may

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[1] My discussion in this opinion is directed to the main questions decided by the Court and necessary to its decision; in ignoring some of the collateral points, I do not mean to imply agreement.

on occasion justify such strains. I believe that reasoned examination will show that the Due Process Clauses provide an adequate tool for coping with confessions and that, even if the Fifth Amendment privilege against self-incrimination be invoked, its precedents taken as a whole do not sustain the present rules. Viewed as a choice based on pure policy, these new rules prove to be a highly debatable if not one-sided appraisal of the competing interests, imposed over widespread objection, at the very time when judicial restraint is most called for by the circumstances.

II. Constitutional Premises.

It is most fitting to begin an inquiry into the constitutional precedents by surveying the limits on confessions the Court has evolved under the Due Process Clause of the Fourteenth Amendment. This is so because these cases show that there exists a workable and effective means of dealing with confessions in a judicial manner; because the cases are the baseline from which the Court now departs and so serve to measure the actual as opposed to the professed distance it travels; and because examination of them helps reveal how the Court has coasted into its present position.

The earliest confession cases in this Court emerged from federal prosecutions and were settled on a nonconstitutional basis, the Court adopting the common-law rule that the absence of inducements, promises, and threats made a confession voluntary and admissible. *Hopt* v. *Utah*, 110 U. S. 574; *Pierce* v. *United States*, 160 U. S. 355. While a later case said the Fifth Amendment privilege controlled admissibility, this proposition was not itself developed in subsequent decisions.[2] The

[2] The case was *Bram* v. *United States*, 168 U. S. 532 (quoted, *ante*, p. 23). Its historical premises were afterwards disproved by

Court did, however, heighten the test of admissibility in federal trials to one of voluntariness "in fact," *Wan* v. *United States*, 266 U. S. 1, 14 (quoted, *ante*, p. 24), and then by and large left federal judges to apply the same standards the Court began to derive in a string of state court cases.

This new line of decisions, testing admissibility by the Due Process Clause, began in 1936 with *Brown* v. *Mississippi*, 297 U. S. 278, and must now embrace somewhat more than 30 full opinions of the Court.[8] While the voluntariness rubric was repeated in many instances, *e. g.*, *Lyons* v. *Oklahoma*, 322 U. S. 596, the Court never pinned it down to a single meaning but on the contrary infused it with a number of different values. To travel quickly over the main themes, there was an initial emphasis on reliability, *e. g.*, *Ward* v. *Texas*, 316 U. S. 547, supplemented by concern over the legality and fairness of the police practices, *e. g.*, *Ashcraft* v. *Tennessee*, 322 U. S. 143, in an "accusatorial" system of law enforcement, *Watts* v. *Indiana*, 338 U. S. 49, 54, and eventually by close attention to the individual's state of mind and capacity for effective choice, *e. g.*, *Gallegos* v. *Colorado*, 370 U. S. 49. The outcome was a continuing re-evaluation

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Wigmore, who concluded "that no assertions could be more unfounded." 3 Wigmore, Evidence § 823, at 250, n. 5 (3d ed. 1940). The Court in *United States* v. *Carignan*, 342 U. S. 36, 41, declined to choose between *Bram* and Wigmore, and *Stein* v. *New York*, 346 U. S. 156, 191, n. 35, cast further doubt on *Bram*. There are, however, several Court opinions which assume in dicta the relevance of the Fifth Amendment privilege to confessions. *Burdeau* v. *McDowell*, 256 U. S. 465, 475; see *Shotwell Mfg. Co.* v. *United States*, 371 U. S. 341, 347. On *Bram* and the federal confession cases generally, see Developments in the Law—Confessions, 79 Harv. L. Rev. 935, 959–961 (1966).

[8] Comment, 31 U. Chi. L. Rev. 313 & n. 1 (1964), states that by the 1963 Term 33 state coerced confession cases had been decided by this Court, apart from *per curiams*. *Spano* v. *New York*, 360 U. S. 315, 321, n. 2, collects 28 cases.

on the facts of each case of *how much* pressure on the suspect was permissible.[4]

Among the criteria often taken into account were threats or imminent danger, *e. g.*, *Payne* v. *Arkansas*, 356 U. S. 560, physical deprivations such as lack of sleep or food, *e. g.*, *Reck* v. *Pate*, 367 U. S. 433, repeated or extended interrogation, *e. g.*, *Chambers* v. *Florida*, 309 U. S. 227, limits on access to counsel or friends, *Crooker* v. *California*, 357 U. S. 433; *Cicenia* v. *Lagay*, 357 U. S. 504, length and illegality of detention under state law, *e. g.*, *Haynes* v. *Washington*, 373 U. S. 503, and individual weakness or incapacities, *Lynumn* v. *Illinois*, 372 U. S. 528. Apart from direct physical coercion, however, no single default or fixed combination of them guaranteed exclusion, and synopses of the cases would serve little use because the overall gauge has been steadily changing, usually in the direction of restricting admissibility. But to mark just what point had been reached before the Court jumped the rails in *Escobedo* v. *Illinois*, 378 U. S. 478, it is worth capsulizing the then-recent case of *Haynes* v. *Washington*, 373 U. S. 573. There, Haynes had been held some 16 or more hours in violation of state law before signing the disputed confession, had received no warnings of any kind, and despite requests had been refused access to his wife or to counsel, the police indicating that access would be allowed after a confession. Emphasizing especially this last inducement and reject-

[4] Bator & Vorenberg, Arrest, Detention, Interrogation and the Right to Counsel, 66 Col. L. Rev. 62, 73 (1966): "In fact, the concept of involuntariness seems to be used by the courts as a shorthand to refer to practices which are repellent to civilized standards of decency or which, under the circumstances, are thought to apply a degree of pressure to an individual which unfairly impairs his capacity to make a rational choice." See Herman, The Supreme Court and Restrictions on Police Interrogation, 25 Ohio St. L. J. 449, 452–458 (1964); Developments, *supra*, n. 2, at 964–984.

ing some contrary indicia of voluntariness, the Court in a 5-to-4 decision held the confession inadmissible.

There are several relevant lessons to be drawn from this constitutional history. The first is that with over 25 years of precedent the Court has developed an elaborate, sophisticated, and sensitive approach to admissibility of confessions. It is "judicial" in its treatment of one case at a time, see *Culombe* v. *Connecticut*, 367 U. S. 568, 635 (concurring opinion of THE CHIEF JUSTICE), flexible in its ability to respond to the endless mutations of fact presented, and ever more familiar to the lower courts. Of course, strict certainty is not obtained in this developing process, but this is often so with constitutional principles, and disagreement is usually confined to that borderland of close cases where it matters least.

The second point is that in practice and from time to time in principle, the Court has given ample recognition to society's interest in suspect questioning as an instrument of law enforcement. Cases countenancing quite significant pressures can be cited without difficulty,[5] and the lower courts may often have been yet more tolerant. Of course the limitations imposed today were rejected by necessary implication in case after case, the right to warnings having been explicitly rebuffed in this Court many years ago. *Powers* v. *United States*, 223 U. S. 303; *Wilson* v. *United States*, 162 U. S. 613. As recently as *Haynes* v. *Washington*, 373 U. S. 503, 515, the Court openly acknowledged that questioning of witnesses and suspects "is undoubtedly an essential tool in effective law enforcement." Accord, *Crooker* v. *California*, 357 U. S. 433, 441.

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[5] See the cases synopsized in Herman, *supra*, n. 4, at 456, nn. 36–39. One not too distant example is *Stroble* v. *California*, 343 U. S. 181, in which the suspect was kicked and threatened after his arrest, questioned a little later for two hours, and isolated from a lawyer trying to see him; the resulting confession was held admissible.

Finally, the cases disclose that the language in many of the opinions overstates the actual course of decision. It has been said, for example, that an admissible confession must be made by the suspect "in the unfettered exercise of his own will," *Malloy* v. *Hogan*, 378 U. S. 1, 8, and that "a prisoner is not 'to be made the deluded instrument of his own conviction,'" *Culombe* v. *Connecticut*, 367 U. S. 568, 581 (Frankfurter, J., announcing the Court's judgment and an opinion). Though often repeated, such principles are rarely observed in full measure. Even the word "voluntary" may be deemed somewhat misleading, especially when one considers many of the confessions that have been brought under its umbrella. See, *e. g.*, *supra*, n. 5. The tendency to overstate may be laid in part to the flagrant facts often before the Court; but in all events one must recognize how it has tempered attitudes and lent some color of authority to the approach now taken by the Court.

I turn now to the Court's asserted reliance on the Fifth Amendment, an approach which I frankly regard as a *trompe l'oeil*. The Court's opinion in my view reveals no adequate basis for extending the Fifth Amendment's privilege against self-incrimination to the police station. Far more important, it fails to show that the Court's new rules are well supported, let alone compelled, by Fifth Amendment precedents. Instead, the new rules actually derive from quotation and analogy drawn from precedents under the Sixth Amendment, which should properly have no bearing on police interrogation.

The Court's opening contention, that the Fifth Amendment governs police station confessions, is perhaps not an impermissible extension of the law but it has little to commend itself in the present circumstances. Historically, the privilege against self-incrimination did not bear at all on the use of extra-legal confessions, for which distinct standards evolved; indeed, "the *history* of the

two principles is wide apart, differing by one hundred years in origin, and derived through separate lines of precedents . . . ." 8 Wigmore, Evidence § 2266, at 401 (McNaughton rev. 1961). Practice under the two doctrines has also differed in a number of important respects.[6] Even those who would readily enlarge the privilege must concede some linguistic difficulties since the Fifth Amendment in terms proscribes only compelling any person "in any criminal case to be a witness against himself." Cf. Kamisar, Equal Justice in The Gatehouses and Mansions of American Criminal Procedure, in Criminal Justice in Our Time 25–26 (1965).

Though weighty, I do not say these points and similar ones are conclusive, for as the Court reiterates the privilege embodies basic principles always capable of expansion.[7] Certainly the privilege does represent a protective concern for the accused and an emphasis upon accusatorial rather than inquisitorial values in law enforcement, although this is similarly true of other limitations such as the grand jury requirement and the reasonable doubt standard. Accusatorial values, however, have openly been absorbed into the due process standard governing confessions; this indeed is why at present "the kinship of the two rules [governing confessions and self-incrimination] is too apparent for denial." McCormick, Evidence 155 (1954). Since extension of the general

[6] Among the examples given in 8 Wigmore, Evidence § 2266, at 401 (McNaughton rev. 1961), are these: the privilege applies to any witness, civil or criminal, but the confession rule protects only criminal defendants; the privilege deals only with compulsion, while the confession rule may exclude statements obtained by trick or promise; and where the privilege has been nullified—as by the English Bankruptcy Act—the confession rule may still operate.

[7] Additionally, there are precedents and even historical arguments that can be arrayed in favor of bringing extra-legal questioning within the privilege. See generally Maguire, Evidence of Guilt § 2.03, at 15–16 (1959).

principle has already occurred, to insist that the privilege applies as such serves only to carry over inapposite historical details and engaging rhetoric and to obscure the policy choices to be made in regulating confessions.

Having decided that the Fifth Amendment privilege does apply in the police station, the Court reveals that the privilege imposes more exacting restrictions than does the Fourteenth Amendment's voluntariness test.[8] It then emerges from a discussion of *Escobedo* that the Fifth Amendment requires for an admissible confession that it be given by one distinctly aware of his right not to speak and shielded from "the compelling atmosphere" of interrogation. See *ante*, pp. 27–28. From these key premises, the Court finally develops the safeguards of warning, counsel, and so forth. I do not believe these premises are sustained by precedents under the Fifth Amendment.[9]

The more important premise is that pressure on the suspect must be eliminated though it be only the subtle influence of the atmosphere and surroundings. The Fifth Amendment, however, has never been thought to forbid *all* pressure to incriminate one's self in the situations covered by it. On the contrary, it has been held that failure to incriminate one's self can result in denial

[8] This, of course, is implicit in the Court's introductory announcement that "[o]ur decision in *Malloy* v. *Hogan*, 378 U. S. 1 (1964) [extending the Fifth Amendment privilege to the States] necessitates an examination of the scope of the privilege in state cases as well." *Ante*, p. 25. It is also inconsistent with *Malloy* itself, in which extension of the Fifth Amendment to the States rested in part on the view that the Due Process Clause restriction on state confessions has in recent years been "the same standard" as that imposed in federal prosecutions assertedly by the Fifth Amendment. 378 U. S., at 7.

[9] I lay aside *Escobedo* itself; it contains no reasoning or even general conclusions addressed to the Fifth Amendment and indeed its citation in this regard seems surprising in view of *Escobedo*'s primary reliance on the Sixth Amendment.

of removal of one's case from state to federal court, *Maryland* v. *Soper*, 270 U. S. 9; in refusal of a military commission, *Orloff* v. *Willoughby*, 345 U. S. 83; in denial of a discharge in bankruptcy, *Kaufman* v. *Hurwitz*, 176 F. 2d 210; and in numerous other adverse consequences. See 8 Wigmore, Evidence § 2272, at 440–444, n. 17 (McNaughton rev. 1961); Maguire, Evidence of Guilt § 2.062 (1959). This is not to say that short of jail or torture any sanction is permissible in any case; policy and history alike may impose sharp limits. See, *e. g.*, *Griffin* v. *California*, 380 U. S. 609. However, the Court's unspoken assumption that *any* pressure violates the privilege is not supported by the precedents and it has failed to show why the Fifth Amendment prohibits that relatively mild pressure the Due Process Clause permits.

The Court appears similarly wrong in thinking that precise knowledge of one's rights is a settled prerequisite under the Fifth Amendment to the loss of its protections. A number of lower federal court cases have held that grand jury witnesses need not always be warned of their privilege, *e. g.*, *United States* v. *Scully*, 225 F. 2d 113, 116, and Wigmore states this to be the better rule for trial witnesses. See 8 Wigmore, Evidence § 2269 (McNaughton rev. 1961). Cf. *Henry* v. *Mississippi*, 379 U. S. 443, 451–452 (waiver of constitutional rights by counsel despite defendant's ignorance held allowable). No Fifth Amendment precedent is cited for the Court's contrary view. There might of course be reasons apart from Fifth Amendment precedent for requiring warning or any other safeguard on questioning but that is a different matter entirely. See *infra*, pp. 13–15.

A closing word must be said about the Assistance of Counsel Clause of the Sixth Amendment, which is never expressly relied on by the Court but whose judicial precedents turn out to be linchpins of the confession rules announced today. To support its requirement of a

knowing and intelligent waiver, the Court cites to *Johnson* v. *Zerbst*, 304 U. S. 458, *ante*, p. 37; appointment of counsel for the indigent suspect is tied to *Gideon* v. *Wainwright*, 372 U. S. 335, and *Douglas* v. *California*, 372 U. S. 353, *ante*, p. 35; the silent-record doctrine is borrowed from *Carnley* v. *Cochran*, 369 U. S. 506, *ante*, p. 37, as is the right to an express offer of counsel, *ante*, p. 33. All these cases imparting glosses to the Sixth Amendment concerned counsel at trial or on appeal. While the Court finds no pertinent difference between judicial proceedings and police interrogation, I believe the differences are so vast as to disqualify wholly the Sixth Amendment precedents as suitable analogies in the present cases.[10]

The only attempt in this Court to carry the right to counsel into the station house occurred in *Escobedo*, the Court repeating several times that that stage was no less "critical" than trial itself. See 378 U. S., 485–488. This is hardly persuasive when we consider that a grand jury inquiry, the filing of a certiorari petition, and certainly the purchase of narcotics by an undercover agent from a prospective defendant may all be equally "critical" yet provision of counsel and advice on that score have never been thought compelled by the Constitution in such cases. The sound reason why this right is so freely extended for a criminal trial is the severe injustice risked by confronting an untrained defendant with a range of technical points of law, evidence, and tactics familiar to the prosecutor but not to himself. This danger shrinks markedly in the police station where indeed the lawyer

[10] Since the Court conspicuously does not assert that the Sixth Amendment itself warrants its new police-interrogation rules, there is no reason now to draw out the extremely powerful historical and precedential evidence that the Amendment will bear no such meaning. See generally Friendly, The Bill of Rights as a Code of Criminal Procedure, 53 Calif. L. Rev. 929, 943–948 (1965).

starting about 11:30 a. m. Though at first denying his guilt, within a short time Miranda gave a detailed oral confession and then wrote out in his own hand and signed a brief statement admitting and describing the crime. All this was accomplished in two hours or less without any force, threats or promises and—I will assume this though the record is uncertain, *ante*, 53–54 & nn. 66–67—without any effective warnings at all.

Miranda's oral and written confessions are now held inadmissible under the Court's new rules. One is entitled to feel astonished that the Constitution can be read to produce this result. These confessions were obtained during brief, daytime questioning conducted by two officers and unmarked by any of the traditional indicia of coercion. They assured a conviction for a brutal and unsettling crime, for which the police had and quite possibly could obtain little evidence other than the victim's identifications, evidence which is frequently unreliable. There was, in sum, a legitimate purpose, no perceptible unfairness, and certainly little risk of injustice in the interrogation. Yet the resulting confessions, and the responsible course of police practice they represent, are to be sacrificed to the Court's own finespun conception of fairness which I seriously doubt is shared by many thinking citizens in this country.[16]

The tenor of judicial opinion also falls well short of supporting the Court's new approach. Although *Escobedo* has widely been interpreted as an open invitation to lower courts to rewrite the law of confessions, a significant heavy majority of the state and federal decisions

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[16] "[J]ustice, though due to the accused, is due to the accuser also. The concept of fairness must not be strained till it is narrowed to a filament. We are to keep the balance true." *Snyder* v. *Massachusetts*, 291 U. S. 97, 122 (Cardozo, J.).

in point have sought quite narrow interpretations.[17] Of the courts that have accepted the invitation, it is hard to know how many have felt compelled by their best guess as to this Court's likely construction; but none of the state decisions saw fit to rely on the state privilege against self-incrimination, and no decision at all has gone as far as this Court goes today.[18]

It is also instructive to compare the attitude in this case of those responsible for law enforcement with the official views that existed when the Court undertook three major revisions of prosecutorial practice prior to this case, *Johnson* v. *Zerbst*, 304 U. S. 458, *Mapp* v. *Ohio*, 367 U. S. 643, and *Gideon* v. *Wainwright*, 372 U. S. 335. In *Johnson*, which established that appointed counsel

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[17] A narrow reading is given in: *United States* v. *Robinson*, 354 F. 2d 109 (C. A. 2d Cir.); *Davis* v. *North Carolina*, 339 F. 2d 770 (C. A. 4th Cir.); *Edwards* v. *Holman*, 342 F. 2d 679 (C. A. 5th Cir.); *United States ex rel. Townsend* v. *Ogilvie*, 334 F. 2d 837 (C. A. 7th Cir.); *People* v. *Hartgraves*, 31 Ill. 2d 375, 202 N. E. 2d 33; *State* v. *Fox*, 131 N. W. 2d 684 (Iowa); *Rowe* v. *Commonwealth*, 394 S. W. 2d 751 (Ky.); *Parker* v. *Warden*, 203 A. 2d 418 (Md.); *State* v. *Howard*, 383 S. W. 2d 701 (Mo.); *Bean* v. *State*, 398 P. 2d 251 (Nev.); *Hodgson* v. *New Jersey*, 44 N. J. 151, — A. 2d —; *People* v. *Gunner*, 15 N. Y. 2d 226, 205 N. E. 2d 852; *Commonwealth ex rel. Linde* v. *Maroney*, 416 Pa. 331, 206 A. 2d 288; *Browne* v. *State*, 24 Wis. 2d 491, 131 N. W. 2d 169.

An ample reading is given in: *United States ex rel. Russo* v. *New Jersey*, 351 F. 2d 429 (C. A. 3d Cir.); *Wright* v. *Dickson*, 336 F. 2d 878 (C. A. 9th Cir.); *People* v. *Dorado*, 62 Cal. 2d 338, 398 P. 2d 361; *State* v. *Dufour*, 206 A. 2d 82 (R. I.); *State* v. *Neely*, 229 Ore. 487, 395 P. 2d 557, modified, 398 P. 2d 482.

The cases in both categories are those readily available; there are certainly many others.

[18] For instance, compare the requirements of the catalytic case of *People* v. *Dorado*, 62 Cal. 2d 350, 398 P. 2d 361, with those laid down today. See also Traynor, The Devils of Due Process in Criminal Detection, Detention, and Trial, p. 26 (1966 Cardozo Lecture, N. Y. City Bar Ass'n, multilith copy).

must be offered the indigent in federal criminal trials, the Federal Government all but conceded the basic issue, which had in fact been recently fixed as Department of Justice policy. See Beany, Right to Counsel 29–30, 36–42 (1955). In *Mapp*, which imposed the exclusionary rule on the States for Fourth Amendment violations, more than half of the States had themselves already adopted some such rule. See 367 U. S., at 651. In *Gideon*, which extended *Johnson* v. *Zerbst* to the States, an *amicus* brief was filed by 22 States and Commonwealths urging that course; only two States beside the respondent came forward to protest. See 372 U. S., at 345. By contrast, in this case new restrictions on police questioning have been opposed by the United States and in an *amicus* brief signed by 27 States and Commonwealths, not including the three other States who are parties. No State in the country has urged this Court to impose the newly announced rules, nor has any State chosen to go nearly so far on its own.

The Court in closing its general discussion invokes the practice in federal and foreign jurisdictions as lending weight to its new curbs on confessions for all the States. A brief résumé will suffice to show that none of these jurisdictions has struck so one-sided a balance as the Court does today. Heaviest reliance is placed on the FBI practice. Differing circumstances may make this comparison quite untrustworthy,[19] but in all events the FBI falls sensibly short of the Court's formalistic rules. For example, there is no indication that FBI agents must obtain an affirmative "waiver" before they pursue their questioning. Nor is it clear that one invoking his right to silence may not be prevailed upon to change his mind.

[19] The Court's *obiter dictum* notwithstanding, *ante*, p. 48, there is some basis for believing that the staple of FBI criminal work differs importantly from much crime within the ken of local police. The skill and resources of the FBI may also be unusual.

And the warning as to appointed counsel apparently indicates only that one will be assigned by the judge when the suspect appears before him; the thrust of the Court's rules is to induce the suspect to obtain appointed counsel before continuing the interview. See *ante*, pp. 46–48. Apparently American military practice, briefly mentioned by the Court, has these same limits and is still less favorable to the suspect than the FBI warning, making no mention of appointed counsel. Developments, *supra*, n. 2, at 1084–1089.

The law of the foreign countries described by the Court also reflects a more moderate conception of the rights of the accused as against those of society when other data is considered. Concededly, the English experience is most relevant. In that country, a caution as to silence but not counsel has long been mandated by the "Judges' Rules," which also place other somewhat imprecise limits on police cross-examination of suspects. However, in the court's discretion confessions can be and apparently quite frequently are admitted in evidence despite disregard of the Judges' Rules, so long as they are found voluntary under the common-law test. Moreover, the check that exists on the use of pretrial statements is counterbalanced by the evident admissibility of fruits of an illegal confession and by the judge's often-used authority to comment adversely on the defendant's failure to testify.[10]

India, Ceylon and Scotland are the other examples chosen by the Court. In India and Ceylon the general ban on police-adduced confessions cited by the Court is subject to a major exception: if evidence is uncovered by police questioning, it is fully admissible at trial along with the confession itself, so far as it relates to the evidence and is not blatantly coerced. See Developments,

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[10] For citations and discussion covering each of these points, see Developments, *supra*, n. 2, at 1091–1097, and Enker & Elsen, *supra*, n. 12, at 80 & n. 94.

supra, n. 2, at 1106–1110; *Reg.* v. *Ramasamy* [1965] A. C. 1 (P. C.). Scotland's limits on interrogation do measure up to the Court's; however, restrained comment at trial on the defendant's failure to take the stand is allowed the judge, and in many other respects Scotch law redresses the prosecutor's disadvantage in ways not permitted in this country.[21] The Court ends its survey by imputing added strength to our privilege against self-incrimination since, by contrast to other countries, it is embodied in a written Constitution. Considering the liberties the Court has today taken with constitutional history and precedent, few will find this emphasis persuasive.

In closing this necessarily truncated discussion of policy considerations attending the new confession rules, some reference must be made to their ironic untimeliness. There is now in progress in this country a massive reexamination of criminal law enforcement procedures on a scale never before witnessed. Participants in this undertaking include a Special Committee of the American Bar Association, under the chairmanship of Chief Judge Lumbard of the Court of Appeals for the Second Circuit; a distinguished study group of the American Law Institute, headed by Professor Vorenberg of the Harvard Law School; and the President's Commission on Law Enforcement and Administration of Justice, under the leadership of the Attorney General of the United States.[22] Studies are also being conducted by the

[21] On comment, see Hardin, Other Answers: Search and Seizure, Coerced Confession, and Criminal Trial in Scotland, 113 U. Pa. L. Rev. 165, 181 and nn. 96–97 (1964). Other examples are less stringent search and seizure rules and no automatic exclusion for violation of them, *id.*, at 167–169; guilt based on majority jury verdicts, *id.*, at 185; and pre-trial discovery of evidence on both sides, *id.*, at 175.

[22] Of particular relevance is the ALI's drafting of a Model Code of Pre-Arraignment Procedure, now in its first tentative draft. While the ABA and National Commission studies have wider scope, the former is lending its advice to the ALI project and the executive director of the latter is one of the reporters for the Model Code.

District of Columbia Crime Commission, the Georgetown Law Center, and by others equipped to do practical research.[23] There are also signs that legislatures in some of the States may be preparing to re-examine the problem before us.[24]

It is no secret that concern has been expressed lest long-range and lasting reforms be frustrated by this Court's too rapid departure from existing constitutional standards. Despite the Court's disclaimer, the practical effect of the decision made today must inevitably be to handicap seriously sound efforts at reform, not least by removing options necessary to a just compromise of competing interests. Of course legislative reform is rarely speedy or unanimous, though this Court has been more patient in the past.[25] But the legislative reforms when they came would have the vast advantage of empirical data and comprehensive study, they would allow experimentation and use of solutions not open to the courts, and they would restore the initiative in criminal law reform to those forums where it truly belongs.

IV. Conclusions.

All four of the cases involved here present express claims that confessions were inadmissible, not because of coercion in the traditional due process sense, but solely

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[23] See Brief for the United States in *Westover*, p. 45. The N. Y. Times, June 3, 1966, p. 33 (city ed.) reported that the Ford Foundation has awarded $1,100,000 for a five-year study of arrests and confessions in New York.

[24] The New York Assembly recently passed a bill to require certain warnings before an admissible confession is taken, though the rules are less strict than are the Court's. N. Y. Times, May 24, 1966, p. 35 (late city ed.).

[25] The Court waited 12 years after *Wolf* v. *Colorado*, 338 U. S. 25, declared privacy against improper state intrusions to be constitutionally safeguarded before it concluded in *Mapp* v. *Ohio*, 367 U. S. 643, that adequate state remedies had not been provided to protect this interest so the exclusionary rule was necessary.

because of lack of counsel or lack of warnings concerning counsel and silence. For the reasons stated in this opinion, I would adhere to the due process test and reject the new requirements inaugurated by the Court. On this premise my disposition of each of these cases can be stated briefly.

In two of the three cases coming from state courts, *Miranda* v. *Arizona* (No. 759) and *Vignera* v. *New York* (No. 760), the confessions were held admissible and no other errors worth comment are alleged by petitioners. I would affirm in these two cases. The other state case is *California* v. *Stewart* (No. 584), where the state supreme court held the confession inadmissible and reversed the conviction. In that case I would dismiss the writ of certiorari on the ground that no final judgment is before us, 28 U. S. C. § 1257 (1964 ed.); putting aside the new trial open to the State in any event, the confession itself has not even been finally excluded since the California Supreme Court left the State free to show proof of a waiver. If the merits of the decision in *Stewart* be reached, then I believe it should be reversed and the case remanded so the state supreme court may pass on the other claims available to respondent.

In the federal case, *Westover* v. *United States* (No. 761), a number of issues are raised by petitioner apart from the one already dealt with in this dissent. None of these other claims appears to me tenable, nor in this context to warrant extended discussion. It is urged that the confession was also inadmissible because not voluntary even measured by due process standards and because federal-state cooperation brought the *McNabb-Mallory* rule into play under *Anderson* v. *United States*, 318 U. S. 350. However, the facts alleged fall well short of coercion in my view, and I believe the involvement of federal agents in petitioner's arrest and detention by the State too slight to invoke *Anderson*. I agree with the

Government that the admission of the evidence now protested by petitioner was at most harmless error, and two final contentions—one involving weight of the evidence and another improper prosecutor comment—seem to me without merit. I would therefore affirm Westover's conviction.

In conclusion: Nothing in the letter or the spirit of the Constitution or in the precedents squares with the heavy handed and one-sided action that is so precipitously taken by the Court in the name of fulfilling its constitutional responsibilities. The foray which the Court takes today brings to mind the wise and farsighted words of Mr. Justice Jackson in *Douglas* v. *Jeannette*, 319 U. S. 157, 181 (separate opinion): "This Court is forever adding new stories to the temples of constitutional law, and the temples have a way of collapsing when one story too many is added."

SUPREME COURT OF THE UNITED STATES

Nos. 759, 760, 761 AND 584.—OCTOBER TERM, 1965.

Ernesto A. Miranda, Petitioner, 759 *v.* State of Arizona.	On Writ of Certiorari to the Supreme Court of the State of Arizona.
Michael Vignera, Petitioner, 760 *v.* State of New York.	On Writ of Certiorari to the Court of Appeals of the State of New York.
Carl Calvin Westover, Petitioner, 761 *v.* United States.	On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.
State of California, Petitioner, 584 *v.* Roy Allen Stewart.	On Writ of Certiorari to the Supreme Court of the State of California.

[June 13, 1966.]

MR. JUSTICE WHITE, with whom MR. JUSTICE HARLAN and MR. JUSTICE STEWART join, dissenting.

I.

The proposition that the privilege against self-incrimination forbids in-custody interrogation without the warnings specified in the majority opinion and without a clear waiver of counsel has no significant support in the history of the privilege or in the language of the Fifth Amendment. As for the English authorities and the common-law history, the privilege, firmly established in the second half of the seventeenth century, was never applied except to prohibit compelled judicial interrogations. The rule excluding coerced confessions matured about 100 years later, "[b]ut there is nothing in the

Cicenia v. *Lagay*, 357 U. S. 504, a confession obtained by police interrogation after arrest was held voluntary even though the authorities refused to permit the defendant to consult with his attorney. See generally *Culombe* v. *Connecticut*, 367 U. S. 568, 587–602 (opinion of Frankfurter, J.); III Wigmore, Evidence § 851, at 313 (3d ed. 1940); see also Joy, Confessions 38, 46 (1842).

Only a tiny mincrity of our judges who have dealt with the question, including today's majority, have considered in-custody interrogation, without more, to be a violation of the Fifth Amendment. And this Court, as every member knows, has left standing literally thousands of criminal convictions that rested at least in part on confessions taken in the course of interrogation by the police after arrest.

II.

That the Court's holding today is neither compelled nor even strongly suggested by the language of the Fifth Amendment, is at odds with American and English legal history, and involves a departure from a long line of precedent does not prove either that the Court has exceeded its powers or that the Court is wrong or unwise in its present reinterpretation of the Fifth Amendment. It does, however, underscore the obvious—that the Court has not discovered or found the law in making today's decision, nor has it derived it from some irrefutable sources; what it has done is to make new law and new public policy in much the same way that it has in the course of interpreting other great clauses of the Constitution.[1] This is what the Court historically has done. Indeed, it is what it must do and will continue

[1] Of course the Court does not deny that it is departing from prior precedent; it expressly overrules *Crooker* and *Cicenia*, *ante*, at 41, n. 47, and it acknowledges that "[i]n these cases . . . we might not find the statements to have been involuntary in traditional terms," *ante*, at 19.

to do until and unless there is some fundamental change in the constitutional distribution of governmental powers.

But if the Court is here and now to announce new and fundamental policy to govern certain aspects of our affairs, it is wholly legitimate to examine the mode of this or any other constitutional decision in this Court and to inquire into the advisability of its end product in terms of the long-range interest of the country. At the very least the Court's text and reasoning should withstand analysis and be a fair exposition of the constitutional provision which its opinion interprets. Decisions like these cannot rest alone on syllogism, metaphysics or some ill-defined notions of natural justice, although each will perhaps play its part. In proceeding to such constructions as it now announces, the Court should also duly consider all the factors and interests bearing upon the cases, at least insofar as the relevant materials are available; and if the necessary considerations are not treated in the record or obtainable from some other reliable source, the Court should not proceed to formulate fundamental policies based on speculation alone.

III.

First, we may inquire what are the textual and factual bases of this new fundamental rule. To reach the result announced on the grounds it does, the Court must stay within the confines of the Fifth Amendment, which forbids self-incrimination only if *compelled*. Hence the core of the Court's opinion is that because of the "compulsion inherent in custodial surroundings, no statement obtained from [a] defendant [in custody] can truly be the product of his free choice," *ante*, at 20, absent the use of adequate protective devices as described by the Court. However, the Court does not point to any sudden inrush of new knowledge requiring the rejection of 70 years experience. Nor does it assert that its novel

conclusion reflects a changing consensus among state courts, see *Mapp* v. *Ohio*, 367 U. S. 643, or that a succession of cases had steadily eroded the old rule and proved it unworkable, see *Gideon* v. *Wainwright*, 372 U. S. 335. Rather than asserting new knowledge, the Court concedes that it cannot truly know what occurs during custodial questioning, because of the innate secrecy of such proceedings. It extrapolates a picture of what it conceives to be the norm from police investigatorial manuals, published in 1959 and 1962 or earlier, without any attempt to allow for adjustments in police practices that may have occurred in the wake of more recent decisions of state appellate tribunals or this Court. But even if the relentless application of the described procedures could lead to involuntary confessions, it most assuredly does not follow that each and every case will disclose this kind of interrogation or this kind of consequence.[2] Insofar as it appears from the Court's opinion, it has not examined a single transcript of any police interrogation, let alone the interrogation that took place in any one of these cases which it decides today. Judged by any of the standards for empirical investigation utilized in the social sciences the factual basis for the Court's premise is patently inadequate.

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[2] In fact, the type of sustained interrogation described by the Court appears to be the exception rather than the rule. A survey of 399 cases in one city found that in almost half of the cases the interrogation lasted less than 30 minutes. Barrett, Police Practices and the Law—From Arrest to Release or Charge, 50 Calif. L. Rev. 11, 41–45 (1962). Questioning tends to be confused and sporadic and is usually concentrated on confrontations with witnesses or new items of evidence, as these are obtained by officers conducting the investigation. See generally LaFave, Arrest: The Decision to Take a Suspect into Custody 386 (1965); ALI, Model Pre-Arraignment Procedure Code, Commentary § 5.01, at 170, n. 4 (Tent. Draft No. 1, 1966).

Although in the Court's view in-custody interrogation is inherently coercive, it says that the spontaneous product of the coercion of arrest and detention is still to be deemed voluntary. An accused, arrested on probable cause, may blurt out a confession which will be admissible despite the fact that he is alone and in custody, without any showing that he had any notion of his right to remain silent or of the consequences of his admission. Yet, under the Court's rule, if the police ask him a single question such as "Do you have anything to say?" or "Did you kill your wife?" his response, if there is one, has somehow been compelled, even if the accused has been clearly warned of his right to remain silent. Common sense informs us to the contrary. While one may say that the response was "involuntary" in the sense the question provoked or was the occasion for the response and thus the defendant was induced to speak out when he might have remained silent if not arrested and not questioned, it is patently unsound to say the response is compelled.

Today's result would not follow even if it were agreed that to some extent custodial interrogation is inherently coercive. See *Ashcraft* v. *Tennessee*, 322 U. S. 143, 161 (Jackson, J., dissenting). The test has been whether the totality of circumstances deprived the defendant of a "free choice to admit, to deny, or to refuse to answer," *Lisenba* v. *California*, 314 U. S. 219, 241, and whether physical or psychological coercion was of such a degree that "the defendant's will was overborne at the time he confessed," *Haynes* v. *Washington*, 373 U. S. 503, 513; *Lynumn* v. *Illinois*, 372 U. S. 528, 534. The duration and nature of incommunicado custody, the presence or absence of advice concerning the defendant's constitutional rights, and the granting or refusal of requests to communicate with lawyers, relatives or friends have all been rightly regarded as important data bearing on the basic inquiry. See, *e. g.*, *Ashcraft* v. *Tennessee*,

322 U. S. 143; *Haynes* v. *Washington*, 373 U. S. 503.[3] But it has never been suggested, until today, that such questioning was so coercive and accused persons so lacking in hardihood that the very first response to the very first question following the commencement of custody must be conclusively presumed to be the product of an overborne will.

If the rule announced today were truly based on a conclusion that all confessions resulting from custodial interrogation are coerced, then it would simply have no rational foundation. Compare *Tot* v. *United States*, 319 U. S. 463, 466; *United States* v. *Romano*, 382 U. S. 136. *A fortiori* that would be true of the extension of the rule to exculpatory statements, which the Court effects after a brief discussion of why, in the Court's view, they must be deemed incriminatory but without any discussion of why they must be deemed coerced. See *Wilson* v. *United States*, 162 U. S. 613, 624. Even if one were to postulate that the Court's concern is not that all confessions induced by police interrogation are coerced but rather that some such confessions are coerced and present judicial procedures are believed to be inadequate to identify the

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[3] By contrast, the Court indicates that in applying this new rule it "will not pause to inquire in individual cases whether the defendant was aware of his rights without a warning being given." *Ante*, at 31. The reason given is that assessment of the knowledge of the defendant based on information as to age, education, intelligence, or prior contact with authorities can never be more than speculation, while a warning is a clear-cut fact. But the officers' claim that they gave the requisite warnings may be disputed, and facts respecting the defendant's prior experience may be undisputed and be of such a nature as to virtually preclude any doubt that the defendant knew of his rights. See *United States* v. *Bolden*, 355 F. 2d 453 (C. A. 7th Cir. 1965), petition for cert. pending No. 1146 O. T. 1965 (secret service agent); *People* v. *DuBond*, 235 Cal. App. 2d 844, 45 Cal. Rptr. 717, pet. for cert. pending No. 1053 Misc. O. T. 1965 (former police officer).

confessions that are coerced and those that are not, it would still not be essential to impose the rule that the Court has now fashioned. Transcripts or observers could be required, specific time limits, tailored to fit the cause, could be imposed, or other devices could be utilized to reduce the chances that otherwise indiscernible coercion will produce an inadmissible confession.

On the other hand, even if one assumed that there was an adequate factual basis for the conclusion that all confessions obtained during in-custody interrogation are the product of compulsion, the rule propounded by the Court would still be irrational, for, apparently, it is only if the accused is also warned of his right to counsel and waives both that right and the right against self-incrimination that the inherent compulsiveness of interrogation disappears. But if the defendant may not answer without a warning a question such as "Where were you last night?" without having his answer be a compelled one, how can the court ever accept his negative answer to the question of whether he wants to consult his retained counsel or counsel whom the court will appoint? And why if counsel is present and the accused nevertheless confesses, or counsel tells the accused to tell the truth, and that is what the accused does, is the situation any less coercive insofar as the accused is concerned? The court apparently realizes its dilemma of foreclosing questioning without the necessary warnings but at the same time permitting the accused, sitting in the same chair in front of the same policemen, to waive his right to consult an attorney. It expects, however, that not too many will waive the right; and if it is claimed that he has, the State faces a severe, if not impossible burden of proof.

All of this makes very little sense in terms of the compulsion which the Fifth Amendment proscribes. That amendment deals with compelling the accused himself.

It is his free will that is involved. Confessions and incriminating admissions, as such, are not forbidden evidence; only those which are compelled are banned. I doubt that the Court observes these distinctions today. By considering any answers to any interrogation to be compelled regardless of the content and course of examination and by escalating the requirements to prove waiver, the Court not only prevents the use of compelled confessions but for all practical purposes forbids interrogation except in the presence of counsel. That is, instead of confining itself to protection of the right against compelled self-incrimination the Court has created a limited Fifth Amendment right to counsel—or, as the Court expresses it, a "right to counsel to protect the Fifth Amendment privilege . . . ." *Ante*, at 32. The focus then is not on the will of the accused but on the will of counsel and how much influence he can have on the accused. Obviously there is no warrant in the Fifth Amendment for thus installing counsel as the arbiter of the privilege.

In sum, for all the Court's expounding on the menacing atmosphere of police interrogation procedures it has failed to supply any foundation for the conclusions it draws or the measures it adopts.

IV.

Criticism of the Court's opinion, however, cannot stop at a demonstration that the factual and textual bases for the rule it propounds are, at best, less than compelling. Equally relevant is an assessment of the rule's consequences measured against community values. The Court's duty to assess the consequences of its action is not satisfied by the utterance of the truth that a value of our system of criminal justice is "to respect the inviolability of the human personality" and to require government to produce the evidence against the accused by

its own independent labors. *Ante*, at 22. More than the human dignity of the accused is involved; the human personality of others in the society must also be preserved. Thus the values reflected by the privilege are not the sole desideratum; society's interest in the general security is of equal weight.

The obvious underpinning of the Court's decision is a deep-seated distrust of all confessions. As the Court declares that the accused may not be interrogated without counsel present, absent a waiver of the right to counsel, and as the Court all but admonishes the lawyer to advise the accused to remain silent, the result adds up to a judicial judgment that evidence from the accused should not be used against him in any way, whether compelled or not. This is the not so subtle overtone of the opinion—that it is inherently wrong for the police to gather evidence from the accused himself. And this is precisely the nub of this dissent. I see nothing wrong or immoral, and certainly nothing unconstitutional, with the police asking a suspect whom they have reasonable cause to arrest whether or not he killed his wife or with confronting him with the evidence on which the arrest was based, at least where he has been plainly advised that he may remain completely silent, see *Escobedo* v. *Illinois*, 378 U. S. 478, 499 (dissenting opinion). Until today, "the admissions or confessions of the prisoner, when voluntarily and freely made, have always ranked high in the scale of incriminating evidence." *Brown* v. *Walker*, 161 U. S. 591, 596; see also *Hopt* v. *Utah*, 110 U. S. 574, 584–585. Particularly when corroborated, as where the police have confirmed the accused's disclosure of the hiding place of implements or fruits of the crime, such confessions have the highest reliability and significantly contribute to the certitude with which we may believe the accused is guilty. Moreover, it is by no means certain that the process of confessing is injurious

to the accused. To the contrary it may provide psychological relief and enhance the prospects for rehabilitation.

This is not to say that the value of respect for the inviolability of the accused's individual personality should be accorded no weight or that all confessions should be indiscriminately admitted. This Court has long read the Constitution to proscribe compelled confessions, a salutory rule from which there should be no retreat. But I see no sound basis, factual or otherwise, and the Court gives none, for concluding that the present rule against the receipt of coerced confessions is inadequate for the task of sorting out inadmissible evidence and must be replaced by the *per se* rule which is now imposed. Even if the new concept can be said to have advantages of some sort over the present law, they are far outweighed by its likely undesirable impact on other very relevant and important interests.

The most basic function of any government is to provide for the security of the individual and of his property. *Lanzetta* v. *New Jersey*, 306 U. S. 451, 455. These ends of society are served by the criminal laws which for the most part are aimed at the prevention of crime. Without the reasonably effective performance of the task of preventing private violence and retaliation, it is idle to talk about human dignity and civilized values.

The modes by which the criminal laws serve the interest in general security are many. First the murderer who has taken the life of another is removed from the streets, deprived of his liberty and thereby prevented from repeating his offense. In view of the statistics on recidivism in this county [4] and of the number of instances

[4] Precise statistics on the extent of recidivism are unavailable, in part because not all crimes are solved and in part because criminal records of convictions in different jurisdictions are not brought together by a central data collection agency. Beginning in 1963, however, the Federal Bureau of Investigation began collating data on "Careers in Crime," which it publishes in its Uniform Crime Re-

in which apprehension occurs only after repeated offenses, no one can sensibly claim that this aspect of the criminal law does not prevent crime or contribute significantly to the personal security of the ordinary citizen.

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ports. Of 192,869 offenders processed in 1963 and 1964, 76% had a prior arrest record on some charge. Over a period of 10 years the group had accumulated 434,000 charges. FBI, Uniform Crime Reports—1964, 27–28. In 1963 and 1964 between 23% and 25% of all offenders sentenced in 88 federal district courts (excluding the District Court for the District of Columbia) whose criminal records were reported had previously been sentenced to a term of imprisonment of 13 months or more. Approximately an additional 40% had a prior record less than prison (juvenile record, probation record, etc.). Administrative Office of the United States Courts, Federal Offenders in the United States District Courts: 1964, x, 36 (hereinafter cited as Federal Offenders: 1964); Administrative Office of the United States Courts, Federal Offenders in the United States District Courts: 1963, 25–27 (hereinafter cited as Federal Offenders: 1963). During the same two years in the District Court for the District of Columbia between 28% and 35% of those sentenced had prior prison records and from 37% to 40% had a prior record less than prison. Federal Offenders: 1964, xii, 64, 66; Administrative Office of the United States Courts, Federal Offenders in the United States District Court for the District of Columbia: 1963, 8, 10 (hereinafter cited as District of Columbia Offenders: 1963).

A similar picture is obtained if one looks at the subsequent records of those released from confinement. In 1964, 12.3% of persons on federal probation had their probation revoked because of the commission of major violations (defined as one in which the probationer has been committed to imprisonment for a period of 90 days or more, been placed on probation for over one year on a new offense, or has absconded with felony charges outstanding). Twenty-three and two-tenths percent of parolees and 16.9% of those who had been mandatorily released after service of a portion of their sentence likewise committed major violations. Reports of the Proceedings of the Judicial Conference of the United States and Annual Report of the Director of the Administrative Office of the United States Courts: 1965, 138. See also Mandel et al., Recidivism Studied and Defined, 56 J. of Crim. L., C. & P. S. 59 (1965) (within five years of release 62.33% of sample had committed offenses placing them in recidivist category).

the accused may feel that the best thing he can do is to cooperate.

At the same time, the Court's *per se* approach may not be justified on the ground that it provides a "bright line" permitting the authorities to judge in advance whether interrogation may safely be pursued without jeopardizing the admissibility of any information obtained as a consequence. Nor can it be claimed that judicial time and effort, assuming that is a relevant consideration, will be conserved because of the ease of application of the new rule. Today's decision leaves open such questions as whether the accused was in custody, whether his statements were spontaneous or the product of interrogation, whether the accused has effectively waived his rights, and whether nontestimonial evidence introduced at trial is the fruit of statements made during a prohibited interrogation, all of which are certain to prove productive of uncertainty during investigation and litigation during prosecution. For all these reasons, if further restrictions on police interrogation are desirable at this time, a more flexible approach makes much more sense than the Court's constitutional straitjacket which forecloses more discriminating treatment by legislative or rule-making pronouncements.

Applying the traditional standards to the cases before the Court, I would hold these confessions voluntary. I would therefore affirm in Nos. 759, 760, and 761 and reverse in No. 584.